

Restoring the Abundant Trust: Tribal Litigation in Pacific Northwest Salmon Recovery

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Between 2004 and 2006 the nation is commemorating the bicentennial of the Lewis and Clark Expedition. There is no lack of fanfare surrounding the remarkable journey, as demonstrated by celebrations and interpretive events across all along the route. But many are using this occasion as a landmark in time to engage in more somber reflection. The "Corps of Discovery" paved the way for Manifest Destiny by "discovering" the territory eyed by burgeoning American imperialists.¹ On the heels of the expedition came rapid subjugation of both nature and native peoples. Today, at the mark of 200 years, the rivers Lewis and Clark traveled on are bare semblances of their natural form. Dams plug the natural flows in order to provide for irrigation, flood control, electricity, navigation, and recreation. The native fisheries in river basins across the country are near extinction.² Not

¹ See Robert J. Miller, *Another look at The Lewis and Clark Expedition*, <BI>Or. State Bar Bull.<D>, Feb./Mar. 2004, at 35, available at <http://www.osbar.org/publications/bulletin/04febmar/heritage.html> (last visited Dec. 27, 2005) ("Lewis and Clark were military officers serving American empire--and Manifest Destiny--and were the vanguard of American legal doctrines and policies that ultimately robbed the indigenous peoples of just about everything they possessed.").

² See Mary Christina Wood, *Reclaiming the Natural Rivers: The Endangered Species Act as Applied to Endangered River Ecosystems*, 40 <BI>Ariz. L. Rev.<D> 197, 211-213 (1998) (discussing extinctions in Colorado and Columbia Basins); Sandra B. Zellmer, *A New Corps of Discovery for Missouri River Management*, 83 <BI>Neb. L. Rev.<D> 305, 306 (2004). See also, e.g., *Natural Resources Defense Council v. Patterson*, 333 F. Supp. 2d 906, 908-912 (E.D. Cal. 2004) (describing the disappearance of native fish from San Joaquin River, which once supported 50,000 to 100,000 fish); *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1226 (10th Cir. 2002) ("[D]amming, channelization, and the

surprisingly, the bicentennial has triggered an inquiry into the ecological future of the nation. This Article explores how tribes of the Pacific Northwest are using the courts to try to reclaim for future generations a measure of the natural abundance of salmon that Lewis and Clark witnessed.

Across their exploration route Lewis and Clark observed a world in which Indian tribes exercised territorial sovereignty over nearly all of the land. Nature was abundant and for the most part in a state of remarkable balance. Many tribes exercised aboriginal management over resources in a manner deliberately aimed towards maintaining a sustainable existence.³ Indeed, the tribes of the Pacific Northwest managed to engage in a sustainable harvest of salmon that lasted for at least 10,000 years prior to the arrival of Lewis and Clark.⁴ Their sovereignty was a direct outgrowth of a spiritual mandate to preserve resources for future generations.⁵ Essentially, though tribes did not describe their laws in western legal terms, the governing sovereign mandate adhered to by tribes of different cultures was a trust concept of maintaining the resources as a constant natural

introduction of nonnative predatory fish have decimated the Silvery Minnow population [which] currently occupies only five percent of its historic range.”).

A seminal paper that brought attention to the extinction crisis facing Pacific salmon is W. Nehlsen, J.A. Lichatowich, and J.E. Williams, *Pacific Salmon at the Crossroads: Stocks at Risk from California, Oregon, Idaho and Washington*, 16 *Fisheries* (No. 2), 4-21 (1991)(concluding that 106 major stocks which historically occurred were already extinct and 214 of the remaining stocks were at various degrees of risk of extinction).

³ See Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 *Vt. L. Rev.* 225, 286-87 (1996) (“For Indian peoples, who traditionally interpreted their relationship with the land and with future generations as holistic, cyclical, and permanent, sustainability was the natural result, if not the conscious goal, of deeply rooted environmental ethics and traditional land-based economies.”).

⁴ See Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part 1): Applying Principles of Sovereignty to Protect Imperiled Wildlife Populations*, 37 *Idaho L. Rev.* 1, 2 (2000).

⁵ See *id.* at 70-71 (discussing Columbia River treaty tribes’ salmon recovery plan).

asset that would be available to humankind in perpetuity.⁶ Tribes exercised a kind of trustee stewardship to protect the interests of beneficiaries several generations distant.⁷

At momentous anniversaries such as the Lewis and Clark Bicentennial, it is instructive to look at nature's bounty, such as the great Pacific salmon runs, from the lens of a trust construct to determine what society's present obligations are to future generations. Bureaucrats within the federal and state agencies rarely refer to the natural resources they manage as "trust" assets, but in fact it is important to acknowledge a de facto natural trust. The resources important for future generations include a supply of clean water, air, wildlife, soils, forests, and a myriad of other natural elements needed to sustain life. Decisions made today by government will directly affect the abundance available in the trust for future generations. If policymakers fail to think of natural resources in trust terms, they will fail to see the effect of today's regulatory actions in concrete terms of natural wealth affecting future generations.⁸ Lewis and Clark's voluminous scientific documentation of plants and species is perhaps the most accurate accounting of a natural trust that existed 200 years ago and establishes the baseline against which we can now evaluate the extraordinary depletion that has occurred over 200 years under a new set of "trustees."

⁶ *See id.*

⁷ Tsoisie, *supra* note 3, at 287 ("Many contemporary indigenous peoples thus advocate a Native concept of sustainability that 'means ensuring the survival of the people, the land and the resources for seven generations.'") (citing Linda Clarkson et al., *Our Responsibility to the Seventh Generation: Indigenous Peoples and Sustainable Development* 65 (1992)).

⁸ *See generally* Mary Christina Wood, *Protecting the Wildlife Trust: A Reinterpretation of Section 7 of the Endangered Species Act*, 34 *Envtl. L.* 605 (2004) (suggesting interpretation of the Endangered Species Act (ESA), 16 U.S.C. §§1531-1544, ELR *Stat.* ESA §§2-18, in accordance with trust principles).

While the majority society seemingly pays lip service to an obligation to preserve natural resources such as salmon for future generations,⁹ day-to-day decisionmaking has failed to incorporate the goal of long-term conservation as a mandate in any practical sense. The evidence lies in the rivers themselves. For example, at the time of Lewis and Clark, returns of fish to the Columbia River alone approximated 10 to 16 million fish.¹⁰ Today, populations of wild salmon have plummeted over 90% and many stocks have already gone extinct.¹¹ In the 1940s, the population of coho in the Klamath River was in the range of 50,000 to 125,000 fish; by 1996 it had dropped to 6,000 fish.¹² Populations of chinook salmon in Puget Sound are at only 10% of historic levels; in some basins they are at 1% of historic levels.¹³ At least 15 chinook runs have gone extinct.¹⁴

The problem, it seems, lies in the perception of the resource itself and the law's lagged response to factors that threaten the resource. Much like a financial asset, the salmon resource is comprised of two components: capital and yield.¹⁵ The capital consists of all of the natural conditions that perpetuate the species--conditions such as free-flowing rivers with adequate water quality and quantity, clean gravel beds for spawning, riparian conditions for juvenile rearing, an adequate adult population that can sustain the species through reproduction, and a myriad of other factors. The yield component is the

⁹ See, e.g., National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4331(b)(1) (declaring that the federal government has the duty to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.").

¹⁰ See Wood, *supra* note 2, at 212.

¹¹ *Id.*

¹² See Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1086 (9th Cir. 2005).

¹³ <BI>Shared Strategy for Puget Sound<D>, Draft Puget Sound Salmon Recovery Plan, Exec. Summ. at 3 (June 30, 2005) . For more information on declines in Puget Sound salmon, see the Shared Strategy for Puget Sound website at <http://www.sharedsalmonstrategy.org>.

¹⁴ <BI>Shared Strategy for Puget Sound<D>, *supra* note 13, Exec. Summ. at 3.

¹⁵ For a more in-depth discussion, see Wood, *supra* note 4, at 42-45.

quantifiable number of fish that can be harvested without depleting the resource. Society benefits most obviously from the yield component of the resource. But the yield is directly related to the capital component. If the natural capital needed to sustain the species is diminished, the yield will be reduced as well. An analogy can be made to a financial asset comprised of certain forms of capital (stocks, bonds, cash, and the like). Such capital produces a yield in the form of dividends. If the capital diminishes, so will the yield--the dividends.

In a perpetual trust model, a financial trustee is typically required to preserve the capital and disperse the yield to the beneficiaries. In salmon terms, this would mean preserving the river flows, wetlands, forests, and water quality that support salmon production and allowing harvest of just the amount of salmon that can be taken without impairing the population's sustainability at abundant numbers.¹⁶ This simple concept, however, has yet to take a center position in salmon law. The law has been responsive to salmon yield issues, but not to issues of capital depletion. In the 1970s, the U.S. Supreme Court and lower courts issued landmark opinions dividing the harvest of salmon between states and tribes.¹⁷ Courts had to take a prominent role in harvest disputes because states tried to monopolize the salmon resource through discriminatory regulation of tribal fishing.¹⁸ Today, however, those cutting-edge opinions have lost much of their meaning because there simply are not enough salmon in the rivers to produce a meaningful yield

¹⁶ *See id.* at 43.

¹⁷ *See* *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *United States v. Oregon*, 302 F. Supp. 899, 904 (D. Or. 1969).

¹⁸ *See Puyallup Tribe v. Washington Dep't of Fish & Game*, 391 U.S. 392 (1968) (state regulation of tribal harvest must not be discriminatory).

for either states or tribes.¹⁹ This is due to the fact that the natural capital supporting salmon throughout the entire Pacific Northwest has been greatly diminished by hydroelectric development, wetland loss, urbanization, deforestation, and pollution. In 1995 the National Marine Fisheries Service (NMFS) concluded: “Few examples of naturally functioning aquatic systems (watersheds) now remain in the Pacific Northwest.”²⁰

As a result of this extraordinary loss of natural capital, tribal fishing economies that survived for millennia prior to Lewis and Clark’s momentous journey are on the brink of collapse. Tribal harvest in the Columbia Basin today is less than 1% of what it was in aboriginal times.²¹ In the Puget Sound region, tribal harvest has plummeted 90% from levels in the mid-1980s.²² It is estimated that tribal people in the Klamath Basin have suffered a 90-fold reduction in salmon consumption since historic times due to scarcity of the resource.²³ This extraordinary natural loss over just the last 200 years has been incremental and ad hoc. The failing in the law is stark, and tribes are now forcing courts to confront it in three basins in the Pacific Northwest: the Columbia; the Klamath; and the Puget Sound.

As a backdrop for examining the tribes’ role in this litigation, it is important to have a broad understanding of how their sovereign position changed as a result of the

¹⁹ See Joseph Cone, *A Common Fate: Endangered Salmon and the People of the Pacific Northwest* (Henry Holt & Co. 1995).

²⁰ See Wood, *supra* note 2, at 213 (citing the National Marine Fisheries Service’s (NMFS’) draft recovery plan for Snake River salmon). The NMFS has periodically been called the National Oceanic and Atmospheric Administration Fisheries Service (NOAA Fisheries), but for simplicity’s sake, the acronym NMFS is used throughout this Article.

²¹ See Wood, *supra* note 4, at 2.

²² Andrew Engelson, *Tribes Fight to Clear the Roads for Salmon*, *High Country News*, July 2, 2001.

²³ Kari Norgaard, *The Effects of Altered Diet in the Health of the Karuk People* 5, 12 (Karuk Tribe 2005).

treaty era. Prior to the treaties, the tribes exercised sovereign management over their aboriginal territories²⁴ and could be deemed trustees of their natural resources. But in the mid-1880s, the federal government entered into treaties (or treaty equivalents) with the tribes of the Pacific Northwest,²⁵ with the result that direct tribal control over collective trust assets diminished considerably. When tribes were forced onto small reservations, they lost their geographic jurisdiction over the broad landscape of the Pacific Northwest. With the signing of the treaties, a new set of sovereign trustees--the federal government and states--asserted dominion over the natural trust. However, many tribes reserved rights in the treaties to fish in their usual and accustomed places.²⁶ These rights have always been deemed property rights.²⁷ Thus, while the tribes have lost sovereign authority over

²⁴ See Edmund J. Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Cocomanagement as a Reserved Right*, 30 *Env'tl. L.* 279, 282-4, 309-10, 323 (2000); Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part II): Asserting a Sovereign Servitude to Protect Habitat of Imperiled Species*, 25 *Vt. L. Rev.* 355, 369-374 (2001).

²⁵ Isaac Stevens, the first Governor and first Superintendent of Indian Affairs of the Washington Territory, was the architect of the treaties negotiated with the Puget Sound and Columbia River Tribes. See *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 666, 674, n. 21 (1979). The Klamath Tribe's treaty of 1862 is described in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert denied*, 467 U.S. 1252 (1984). The Hoopa Valley and Yurok Tribes shared a reservation created by executive orders pursuant to a statute passed in 1864. See *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995). The Ninth Circuit has held that those executive orders are treaty equivalents. *Id.* at 544-46 (“[T]ribal rights derived from executive order are treated the same as treaty rights.”).

²⁶ See *Washington Passenger Fishing Vessel*, 443 U.S. at 674 (quoting treaties negotiated with Puget Sound and Columbia River treaty tribes that provide: “The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory. . . .”); *Adair*, 723 F.2d at 1398 (discussing Article I of the 1864 treaty with the Klamath Tribe, which reserved to the Tribe the “exclusive right to hunt, fish, and gather on [its] reservation.”); *Parravano*, 70 F.3d at 5445 (executive orders creating the Hoopa Valley reservation created recognizable fishing rights tantamount to treaty rights).

²⁷ See *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) (referring to fishing and hunting rights as “property rights conferred by treaty,” and noting their abrogation would give rise to compensation requirement); *Whitefoot v. United States*, 293 F.2d 658, 663 (Ct. Cl. 1961) (stating interest in the fisheries is a tribal property right); *Muckleshoot v. Hall*, 698 F. Supp. 1504, 1510 (W.D. Wash. 1988) (tribal right to take fish is a property right); *Klamath Tribes v. PacifiCorp*, 2005 WL 1661821, at *2 (D. Or. July 13, 2005) (“[P]laintiffs' treaty fishing rights are protected property rights subject to compensation for an unlawful taking by the federal government”); *United States v. Winans*, 198 U.S. 371, 384 (1905) (describing treaty fishing access in ceded areas as an easement enforceable against subsequent landowners); see also Wood, *supra* note 4, at 36.

the ceded lands, they do maintain a set of property rights that is antecedent to rights later acquired by the federal government, states, and individuals.

Today, federal and state trustees manage the natural trust through laws such as the Endangered Species Act (ESA),²⁸ the National Environmental Policy Act,²⁹ the Clean Water Act,³⁰ and several other prominent statutes and land use laws. If tribes are to assert rights to protection of the natural capital needed to sustain the salmon resource, they must either rely on their unique property rights or on the majority society's own laws, the primary one of which is the ESA. For the most part, the ESA has proved ineffectual at recovering the species because the agencies that implement the ESA are politically pressured from carrying out its recovery mandate.³¹ In current litigation in three basins of the Pacific Northwest, tribes are asking courts either to recognize their unique property rights to the natural capital sustaining fish,³² or to enforce the ESA in a more meaningful way.³³ Both avenues prevail upon the judicial branch to step up to the historic task of preserving a fishery resource that, without intervention, seems doomed for extinction under federal and state trustee management.

It is clear in this litigation that marked tension exists today between two different visions of the natural trust, and the Lewis and Clark Bicentennial presents an ideal time for the broader society to explore the conflict and how it is resolved on the playing field of modern environmental law. One vision might be called the "abundant natural trust."

This vision refers back to aboriginal or pre-contact times as a baseline for environmental

²⁸ 16 U.S.C. §§1531-1544, ELR <BI>Stat.<D> ESA §§2-18.

²⁹ 42 U.S.C. §§4321-4370d, ELR <BI>Stat.<D> NEPA §§2-209.

³⁰ 33 U.S.C. §§1251-1387, ELR <BI>Stat.<D> FWPCA §§101-607.

³¹ See discussion *infra* notes 51-53 and accompanying text.

³² See *infra* Parts II (Klamath) and III (Puget Sound).

³³ See *infra* Part I (Columbia). The Klamath Basin litigation also involves ESA claims. See Part II.B. *infra*.

recovery goals. While accepting some inevitable diminishment in natural abundance for the sake of industrial or societal needs, the vision of the abundant natural trust promotes species recovery. In the Columbia River and Klamath basins, for example, tribes and conservation groups are advocating for changes in federal dam operations to improve migration conditions for salmon. Tribes in the Puget Sound area are challenging the state of Washington's operation and maintenance of culverts, which block migrating fish from their habitat. The natural river regime these tribes advocate for does not envision a complete return to the fish abundance Lewis and Clark witnessed, but at least an adequate fish population to allow tribes and non-Indian commercial fishermen to reclaim a robust salmon harvest economy.

The competing vision is one of a "diminished trust." That vision accepts a tremendous loss of natural abundance--even the extinction of species--in favor of technological "progress." It is clear that this vision has dominated river management across the Northwest. In the Columbia River Basin alone, eight monolithic dams operated by the federal government block the course of the Snake and lower Columbia Rivers.³⁴ The Aboriginal River³⁵ that Lewis and Clark navigated is now a series of stagnant reservoirs controlled by the U.S. Army Corps of Engineers.³⁶ The dams cause the

³⁴ See Wood, *supra* note 2, at 208 n.67 and accompanying text.

³⁵ See William Dietrich, *Northwest Passage: The Great Columbia River* (1995) (presenting maps of the "Aboriginal River"). See also Wood, *supra* note 2, at 203-218 (comparing aboriginal river to current endangered river and describing efforts to restore a more "normative river").

³⁶ Overall, there are more than 500 dams in the Columbia Basin, giving it the dubious distinction of being the most dammed watershed in the world. *Dollars, Sense & Salmon: An Argument for Breaching Four Dams on the Lower Snake River*, *Idaho Statesman* (Boise, Idaho), Sept. 22, 1997, at 5B-24. The Columbia of today has been described as "a technocratic battleground, a river turned on and off by valves and switches to please the competing needs of [users]." Dietrich, *supra* note 35, at 47.

overwhelming source of salmon mortality--up to 92% for some species.³⁷ In the Klamath Basin, the Bureau of Reclamation has entirely transformed the natural hydrology through the Klamath Reclamation Project--a series of dams and reservoirs that substantially decrease the vital flow of water in the Klamath River.³⁸ Dams have likewise caused huge fisheries losses in the Skokomish and other sub-basins of the Puget Sound region.³⁹ Modifications can be made in the dams to improve conditions for fish, but the federal agencies that operate and regulate the dams are reluctant to change a status quo that has grown around the diminished trust.⁴⁰

This Article presents an overview of the three areas of ongoing litigation in the Pacific Northwest in which tribes are seeking to assert their vision of recovery. Part I of this Article explores recent litigation in the Columbia River Basin under the ESA to reform the Corps' dam operations. Part II examines litigation in the Klamath Basin that relies on a common law Indian trust theory to force the Bureau of Reclamation to increase water flows in the Klamath River. Part III focuses on pending litigation in the broader Puget Sound area using a treaty rights theory to force the state to retrofit its system of culverts.

³⁷ National Wildlife Fed'n v. National Marine Fisheries Serv., 422 F.3d 782, 789 (9th Cir. 2005); National Wildlife Fed'n v. National Marine Fisheries Serv., CV 01-640-RE, 2005 U.S. Dist. LEXIS 16345, at *41 (D. Or. May 26, 2005) (“[T]here is no dispute that ongoing operation of DAMS is lethal to listed salmon and steelhead populations.”). Habitat destruction, pollution, hatchery management, and historical over-harvest are also contributing causes to the collapse of salmon. See Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 *Env'tl. L.* 733, 764-68 (1994).

³⁸ See Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 138 F. Supp. 2d 1228 (N. D. Cal. 2001).

³⁹ See Skokomish Indian Tribe v. United States, 401 F.3d 979, 982 (9th Cir. 2005), *as amended by* 410 F.3d 506 (9th Cir. 2005); Northwest Fisheries Science Center, *Elwha River Dam Removal Study* (NMFS 2005), available at <http://www.nwfsc.noaa.gov/research/divisions/ec/wpg/elwha.cfm> (last visited Dec. 27, 2005).

⁴⁰ See *infra* note 48 and accompanying text.

It is evident from these cases that tribes have a central role to play in the effort to restore parts of the natural trust. As sovereigns with fish and wildlife agencies, tribes may be uniquely situated to provide administrative and management expertise that a court can consider in fashioning meaningful injunctive relief. This is particularly important where, as in the Columbia River Basin, an administrative vacuum exists due to the political recalcitrance of the federal agency charged with implementing the ESA. Moreover, as in the Klamath and Puget Sound litigation, tribes are uniquely situated to assert claims based on their property rights reserved by treaties or treaty equivalents. Such claims may call for a level of natural trust protection far surpassing the “deathbed” protection offered by the ESA, which thus far has been, in many cases, geared to the lowest level of species survival. All three cases involve ongoing litigation either at the trial or appeal stage. It is clear that the final outcome of these cases will largely determine whether tribes--and the broader society as a whole--can reclaim and protect some of the natural capital that federal and state trustees have depleted over the past 200 years.

I. ESA Litigation in the Columbia Basin: *National Wildlife Federation v. National Marine Fisheries Service*

The ESA litigation in the Columbia River Basin has lasted for over a decade and involves one of the most complex wildlife conflicts in the country. To fully understand the Columbia River treaty tribes’ role in this litigation, it is important to grasp the purpose of the ESA and its implementation failures. The ESA was passed in 1973 with the clear goal

of recovering species that are threatened with extinction.⁴¹ In promoting recovery, the Act calls for action that replenishes at least some of the abundant trust that has been lost through society's actions. Since the species in the Columbia River Basin were listed in the early 1990s, one would expect significant changes in river operations by 2005. In reality, however, political forces impair the federal agencies' effective implementation of the ESA in the Columbia River Basin and in other areas throughout the country. In the words of the district court of Oregon, "[I]t is apparent that the listed species [in the Columbia River Basin] are in serious decline and not evidencing signs of recovery."⁴²

The ESA is implemented by the NMFS for marine mammals and anadromous fish such as the Pacific salmon, and by the U.S. Fish and Wildlife Service (FWS) for all other species.⁴³ Section 7 requires federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of [designated critical] habitat."⁴⁴ To ensure that this substantive no-jeopardy standard will be met, the Act requires the action agency to engage in a process of consultation with the applicable Service whenever any of its actions may affect an ESA-listed species.⁴⁵ The Service analyzes the proposed action to determine whether it will cause jeopardy to the

⁴¹ See 16 U.S.C. §1531(b) ("The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such . . . species."). "Conservation" is defined as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." *Id.* §1532(3). See also *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1237 (10th Cir. 2000) ("Congress' overriding goal in enacting the Endangered Species Act is to promote the protection and, ultimately, the recovery of endangered and threatened species.").

⁴² *National Wildlife Fed'n v. National Marine Fisheries Serv.*, CV 01-640-RE, 2005 U.S. Dist. LEXIS 16345, at *14 (D. Or. May 26, 2005).

⁴³ See 50 C.F.R. §402.01(b) (2004).

⁴⁴ 16 U.S.C. §1536(a)(2).

⁴⁵ See *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985).

species and documents its decision in a biological opinion,⁴⁶ which arrives at one of three conclusions: jeopardy; no jeopardy; or jeopardy unless a set of reasonable and prudent alternatives (RPAs) is followed to avoid jeopardy.⁴⁷ In basins like the Columbia, Klamath, Missouri, and many others where the Bureau of Reclamation and the Corps operate dams, the Services are in the awkward position of passing judgment against their sister agencies within the federal family. This gives rise to extraordinary political pressure because the developed rivers have tremendous economic interests vested in the status quo.⁴⁸

Section 7 was designed by Congress to be a purely science-based mandate that left no room for balancing economic or political concerns.⁴⁹ However, the “jeopardy” call is ultimately a calculation of acceptable risk to the species.⁵⁰ In practice, when determining risk to the species from the proposed activity, the Services often informally

⁴⁶ See 50 C.F.R. §402.12(h).

⁴⁷ 16 U.S.C. §1536(b)(3)(A).

⁴⁸ For discussion, see Wood, *supra* note 2, at 242-52 (analyzing Columbia and Colorado Basins); Zellmer, *supra* note 2, at 335 (“[T]he Corps and the FWS have exhibited extreme reluctance to disturb the expectations arising from the Law of the River.”). In 1994, the District Court of Oregon overturned the NMFS’ no-jeopardy opinion on the Columbia River hydrosystem, stating:

[This section 7 consultation] process is seriously, “significantly” flawed because it is too heavily geared towards a status quo that has allowed all forms of river activity to proceed in a deficit situation – that is, relatively small steps, minor improvements and adjustments – when the situation literally cries out for a major overhaul. Instead of looking for what can be done to protect the species from jeopardy, *NMFS and the action agencies have narrowly focused their attention on what the establishment is capable of handling with minimal disruption.*

Idaho Dep’t of Fish & Game v. National Marine Fisheries Serv., 850 F. Supp. 886, 900 (D. Or. 1994), *vacated as moot*, 56 F.3d 1071 (9th Cir. 1995) (emphasis added); see also National Wildlife Fed’n v. National Marine Fisheries Serv., CV 01-640-RE, Opinion and Order of Remand, slip op. at 8 (D. Or. Oct. 7, 2005) (“The government’s inaction appears to some parties to be a strategy intended to avoid making hard choices and offending those who favor the *status quo*. Without real action from the Action Agencies, the result will be the loss of the wild salmon.”)(emphasis in original).

⁴⁹ Section 7 requires that the jeopardy determinations be based on the “best scientific and commercial data available.” 16 U.S.C. §1536(a)(2).

⁵⁰ See Daniel J. Rohlf, *Jeopardy Under Endangered Species Act: Playing A Game Protected Species Can’t Win*, 41 Washburn L.J. 114, 158-59 (2001) (“[T]he Services must decide what level of risk to a species or populations is too much, i.e., draw the line between ‘acceptable’ risk and the level of risk that constitutes ‘jeopardy’ to listed species.”); Wood, *supra* note 8, at 624-25.

factor into the equation the political risk to their own self-interest from making a “jeopardy” determination. The political assessment, while clearly inappropriate, continues to be a problem as identified by scholars and an increasing number of agency personnel themselves.⁵¹ The number of jeopardy determinations is quite small across the full scope of ESA implementation.⁵² Not surprisingly, only a few species have been recovered in the 30 years of the Act’s existence.⁵³

⁵¹ See *supra* note 48; Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 *U. Colo. L. Rev.* 277, 319 (1993) (noting the existence of “recurring evidence that--whatever the law--the [reasonable and prudent] alternatives found for controversial projects have been strongly influenced by local and national politics”); Holly Doremus, *Adaptive Management, the Endangered Species Act, and the Institutional Challenges of “New Age” Environmental Protection*, 41 *Washburn L.J.* 50, 58 (2001) (“[T]he story of ESA implementation since 1978 consists generally of the Services exploiting their discretion to the fullest to avoid political controversy.”); Rohlf, *supra* note 50, at 160 (“[F]actors other than risks to the species--including economics, politics, public controversy and the like--are much more likely to influence the Services’ jeopardy assessments.”); Daniel J. Rohlf, *Six Biological Reasons Why the Endangered Species Act Doesn’t Work--And What to Do About It*, 5 *Conservation Biology* 273, 276 (1991) (making decisions “on a case by case basis without relevance to objective standards necessarily injects political and economic consideration into making what by law are supposed to be biological decisions”). For a discussion of the agencies’ politicization of ESA critical habitat decisions, see Katherine Simmons Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 *Envtl. L.* 811, 847-55 (1990).

On February 18, 2004, 62 prominent scientists including Nobel laureates, National Medal of Science recipients, former senior advisers to administrations of both parties, and numerous members of the National Academy of Sciences, released a statement charging that the current administration “has often manipulated the process through which science enters into its decisions.” Union of Concerned Scientists, *Restoring Scientific Integrity in Policymaking*, at http://www.ucsusa.org/scientific_integrity/interference/scientists-signon-statement.html (last visited Dec. 27, 2005). The organization has issued a full report on politicization of science in which it discusses tainted decisions under the ESA both in the Missouri River and the Columbia River context. See Union of Concerned Scientists, *Scientific Integrity in Policy Making* (Feb. 2004 and July 2004 update), at http://www.ucsusa.org/scientific_integrity/interference/reports-scientific-integrity-in-policy-making.html (last visited Dec. 27, 2005). Political intrusion may explain an extreme reversal of approaches to ESA §7 implementation in both the Columbia and Missouri Basins in 2003-2004. See *infra* Part I.A.; Zellmer, *supra* note 2, at 321-324. For analysis of the interplay between science and natural resource politics in the Bush II administration, see Holly Doremus, *Science Plays Defense: Natural Resources Management in the Bush Administration*, 32 *Ecol. L.Q.* 249 (2005).

⁵² See Houck, *supra* note 51, at 318, 322 (noting the “remarkable infrequency” with which either Service finds jeopardy and citing estimates that less than 0.02% of consultations overall resulted in terminated projects); Rohlf, *supra* note 50, at 151 n.153 (citing FWS study finding that in six-year period, jeopardy opinions blocked only 54 activities out of 2,719 formal FWS consultations). Many of the RPAs fashioned by the agencies are “soft alternatives” such as research, monitoring, stocking, and education that do not squarely address the threats to the species yet allow the action to go forward. See Houck, *supra*, note 51, at 320-21.

⁵³ Out of 1,288 listed species, only 15 have been recovered. See Wood, *supra* note 8, at 607 and sources cited therein. However, the ESA has been largely successful at preventing extinctions.

This politicization of the ESA is masked behind the Service's technical judgment. Because there is inevitably scientific uncertainty underlying any jeopardy assessment, the Service can facially attribute a no-jeopardy call to scientific uncertainty rather than to improper political influences.⁵⁴ It has been exceedingly difficult for courts to penetrate the Services' ineffective implementation of the Act for two reasons. First, under a long-standing doctrine of administrative law, courts give deference to agencies' technical or scientific judgments.⁵⁵ Because the jeopardy assessment is deemed to be a technical judgment, many courts are reluctant to second-guess it. The Services' recalcitrance may leave a serious administrative vacuum that these courts have yet to recognize. Second, even when courts find that the Services rendered an invalid biological opinion, they may feel constrained to simply remand the matter back to the agency for a new biological opinion without any injunctive relief.⁵⁶ Until recently, few courts have awarded meaningful injunctive relief to protect the species in the long interim while a new biological opinion is being prepared. This judicial failure may simply perpetuate a dysfunctional bureaucratic cycle.

A. Breaking the Cycle of Dysfunction in the Columbia River Basin

⁵⁴ For discussion, see Wood, *supra* note 2, at 255-58; Wood, *supra* note 8, at 629-30.

⁵⁵ Baltimore Gas & Elec. Co. v. Natural Res. Defense Council, 462 U.S. 87, 103 (1983); National Wildlife Fed'n v. National Marine Fisheries Serv., 422 F.3d 782, 798 (9th Cir. 2005); see also Zellmer, *supra* note 2, at 330-31 (discussing court's deference in reviewing biological opinion for Missouri River operations).

⁵⁶ See, e.g., Idaho Dept. of Fish & Game v. National Marine Fisheries Serv., 850 F. Supp. 886, 901 (D. Or. 1994), *vacated as moot*, 56 F.3d 1071 (9th Cir. 1995) (“[The] court should not direct river operations in the interim pending completion of consultations.”); National Wildlife Fed'n v. National Marine Fisheries Serv., 254 F. Supp. 2d 1196 (D. Or. 2003) (remand without in-river relief); *c.f.* Middle Rio Grande Conservancy Dist. v. Babbitt, 206 F. Supp. 2d 1156 (D.N.M. 2000) (finding invalid FWS' designation of critical habitat for Rio Grande Silvery Minnow but leaving designation in place during remand to agency).

1. The Regulatory Context

The background leading up to the present ESA litigation in the Columbia River Basin extends back 15 years. There are now 13 species of salmon in the Columbia River Basin listed under the ESA.⁵⁷ The first salmon species were listed in the early 1990s, and the NMFS has rendered five biological opinions on the hydrosystem in the decade and a half since.⁵⁸ It is undisputed that the dams cause the overwhelming majority of mortality to the species--as high as 92%⁵⁹--yet the NMFS has never forced major changes to the hydrosystem. Indeed, as the years passed since the initial listings, it became obvious that the NMFS was carrying out the ESA in a manner primarily designed to be protective of the status quo.⁶⁰

The NMFS issued its first biological opinion on the impact of hydropower operations in 1992, concluding that the dams would not jeopardize the listed species.⁶¹ A second biological opinion issued in 1993 arrived at the same conclusion and was

⁵⁷ See *National Wildlife Fed'n*, 422 F.3d at 788 n.2.

⁵⁸ *National Wildlife Fed'n v. National Marine Fisheries Serv.*, CV. 01-640-RE, 2005 U.S. Dist. LEXIS 16345, at *93 (D. Or. May 26, 2005) (Attachment 2, summary of biological opinions).

⁵⁹ See supra note 37. See also *National Wildlife Fed'n*, 422 F.3d at 789, 795 (“[T]he federal operation of the Columbia and Snake River dams ‘strongly contribute to the endangerment of the listed species and irreparable injury will result if changes are not made.’”) (citing district court findings). The Ninth Circuit summarized the difficult migration conditions caused by dams in *Northwest Resource Information Center v. Northwest Power Planning Council*, 35 F.3d 1371, 1376 (9th Cir. 1994):

Smolts surviving passage through the turbines of one dam enter the large, slow-moving reservoir of water formed by the next dam. The river no longer has the strong, swift current needed to carry the smolts rapidly downstream and out to sea. It now takes young fish more than twice as long to migrate downstream as it did before the dams were built. The slower the downstream migration, the more smolts are lost to predators. . . . Depending on flows, juvenile losses . . . average an estimated 15 to 20 percent at each main-stem dam and reservoir complex. Mortalities as high as 30 percent per project have been recorded under particularly adverse conditions.

⁶⁰ *National Wildlife Fed'n*, 422 F.3d at 796 (“[T]he operations involved in this case have had a long history. The district court has monitored the situation carefully over the past few years and has found that the status quo will not lead to recovery of the listed species.”).

⁶¹ *National Wildlife Fed'n*, 2005 U.S. Dist. LEXIS 16345, at *93.

challenged by the state of Idaho, which has a sovereign interest in the fish runs that migrate back to Idaho's Snake River Basin.⁶² In *Idaho Department of Fish and Game v. NMFS*, federal district court Judge **Malcolm** Marsh found the biological opinion invalid on the grounds that it was premised on flawed assumptions and failed to consider relevant facts.⁶³ In language that underscored the crisis facing the basin, Judge Marsh criticized the NMFS for “focus[ing] on the system capabilities . . . rather than stabilization of the species,” and declared that “the situation literally cries out for a major overhaul.”⁶⁴ Nevertheless, the court remanded the case to the NMFS to produce a new biological opinion and stopped short of ordering any other relief.

In 1995, the NMFS produced its third biological opinion on the hydrosystem.⁶⁵ While it concluded this time that the operation of the hydrosystem would cause jeopardy to the species, it offered a set of RPAs that it alleged would avoid jeopardy to the species.⁶⁶ Though the RPAs included some structural and operational initiatives, the measures seemed far short of any “major overhaul” previously called for by Judge Marsh. However, in a challenge brought by a coalition of environmental groups, Judge Marsh upheld the biological opinion, deferring to the agency's expertise.⁶⁷ He concluded, however, “[T]he picture is not that rosy. A lot is left to chance and it is the acceptance of

⁶² *Id.* at *93-94.

⁶³ *Idaho Dept. of Fish & Game v. National Marine Fisheries Serv.*, 850 F. Supp. 886, 893, 898 (D. Or. 1994), *vacated as moot*, 56 F.3d 1071 (9th Cir. 1995).

⁶⁴ *Idaho Dept. of Fish & Game*, 850 F. Supp. at 893, 900.

⁶⁵ *See National Wildlife Fed'n*, 2005 U.S. Dist. LEXIS 16345, at *96-98 (describing biological opinion).

⁶⁶ *Id.* at 97.

⁶⁷ *American Rivers v. National Marine Fisheries Serv.*, CV 96-384-MA, 1997 WL 33793390 (D. Or. 1997).

that risk as part of the [biological opinion] which forms the heart of the current controversy.”⁶⁸

The NMFS produced its fourth biological opinion on the hydrosystem in 2000. Again, the agency found that the dams would cause jeopardy to the species and offered a set of RPAs to avoid jeopardy.⁶⁹ The biological opinion largely relied on off-site mitigation, such as hatchery and habitat improvements, that had not undergone consultation and were not reasonably certain to occur.⁷⁰ Not surprisingly, the biological opinion was swiftly met with a court challenge. In litigation brought by the National Wildlife Federation (in which the tribes and the state of Oregon supported the plaintiffs as amicus parties), Judge **James** Redden found the 2000 opinion invalid⁷¹ and remanded it to the NMFS for an 18-month period during which the agency engaged in a collaborative process with the states, tribes, and other parties under the court’s supervision.⁷² The remand was designed to give NMFS an adequate opportunity to consult with interested parties to “insure that only those . . . mitigation actions which have undergone section 7 consultation, and range-wide off-site non-federal mitigation actions that are reasonably certain to occur, are considered in the [jeopardy] determination.”⁷³

In June 2004, Judge Redden called the parties into court, feeling that the NMFS was not making progress on correcting the RPAs.⁷⁴ At that time the agency advised the

⁶⁸ *Id.* at *10.

⁶⁹ See *National Wildlife Fed’n*, 2005 U.S. Dist. LEXIS 16345, at *98-101 (describing biological opinion).

⁷⁰ See *id.* at *8 (describing biological opinion).

⁷¹ *National Wildlife Fed’n v. National Marine Fisheries Serv.*, 254 F. Supp. 2d 1196 (D. Or. 2003).

⁷² See *National Wildlife Fed’n*, 2005 U.S. Dist. LEXIS 16345, at *8.

⁷³ *National Wildlife Fed’n*, 254 F. Supp. 2d at 1215.

⁷⁴ See *National Wildlife Fed’n*, 2005 U.S. Dist. LEXIS 16345, at *10.

court that it was working on yet another biological opinion.⁷⁵ On July 1, 2004, the NMFS approved a major modification to the Corp's river operations under the 2000 biological opinion, allowing a reduced summer spill program. The summer spill through the dams improves the survival rate of juvenile salmon, and the NMFS had assigned the spill measure the "highest priority" in the RPA under the 2000 biological opinion.⁷⁶

Environmental plaintiffs swiftly sought injunctive relief, and on July 29, 2004, the court enjoined the Corps from curtailing spill in the summer of 2004.⁷⁷ On November 30, 2004, the NMFS issued the 2004 biological opinion--its fifth in nearly 15 years.⁷⁸ Rather than implementing the directives from the court on the prior remand, the agency came up with a new approach to jeopardy analysis that would have solidified the diminished trust model into Columbia River ESA implementation. Under its novel approach, the NMFS found that the dams did not cause jeopardy to the species.⁷⁹

On May 26, 2005, Judge Redden issued an opinion rejecting the NMFS' new approach and finding its biological opinion invalid under the ESA.⁸⁰ On June 10, 2005, the court issued an opinion and order for injunctive relief requiring spill of water over certain dams to assist in juvenile salmon migration.⁸¹ In an opinion issued July 26, 2005, the U.S. Court of Appeals for the Ninth Circuit upheld Judge Redden's June 10 order and

⁷⁵ *Id.*

⁷⁶ *National Wildlife Fed'n v. National Marine Fisheries Serv.*, CV 01-640-RE, 2004 U.S. Dist. LEXIS 15239, *3-5 (D. Or. July 29, 2004). As the court noted, the NMFS had concluded in the 2000 biological opinion that jeopardy "would occur [for listed species] unless mitigation measures included in the RPA were implemented. A core element of the RPA is summer spill through August at the dams in question." *Id.* at *9.

⁷⁷ *Id.* at *15.

⁷⁸ *See National Wildlife Fed'n*, 2005 U.S. Dist. LEXIS 16345, at *10.

⁷⁹ *Id.* at *10-11.

⁸⁰ *Id.* at *11.

⁸¹ *National Wildlife Fed'n v. National Marine Fisheries Serv.*, CV 01-640-RE, 2005 U.S. Dist. LEXIS 16352 (D. Or. June 10, 2005).

affirmed his authority to impose the spill relief.⁸² On October 7, 2005, the court issued a detailed order remanding the biological opinion to the NMFS with explicit instructions to “collaborate with the sovereign entities”--the tribes and the states--in the process of developing a new biological opinion.⁸³ From the language of all of these 2005 opinions, it is quite clear that the judicial branch is finally riding herd on an ESA process that is mired in dysfunction as a result of political manipulation. It is equally clear that the tribes have played a central role in this evolution.⁸⁴

2. The Tribal Role

Though their formal designation is only as *amicus curia* to the court, the four Columbia River treaty tribes have submitted numerous briefs to the court, made oral arguments, offered expert declarations by their scientists as to the benefits of spill measures, and have been involved in negotiations at various stages.⁸⁵ This active tribal role can only be understood in light of the historical backdrop. The Stevens treaties of 1855 gave the

⁸² *National Wildlife Fed’n v. National Marine Fisheries Serv.*, 422 F.3d 782, 800 (9th Cir. 2005) (but remanding the question of whether the injunction should be modified in light of new issues at certain sites).

⁸³ *National Wildlife Fed’n v. National Marine Fisheries Serv.*, CV 01-640-RE, Opinion and Order of Remand, slip op. at 11-13 (D. Or. Oct. 7, 2005). On December 29, 2005, the court issued another order granting partial injunctive relief requested by National Wildlife Federation and treaty tribes in the form of late spring spill measures for 2006. The court denied some of the measures requested by tribes and plaintiffs. *National Wildlife Fed’n v. National Marine Fisheries Serv.*, CV 01-640-RE, Opinion and Order, slip op. at 9 (D. Or. Dec. 29, 2005).

⁸⁴ It should be noted that the state of Oregon has also played a pivotal role, but discussion of that role is beyond the scope of this Article.

⁸⁵ See *National Wildlife Fed’n v. National Marine Fisheries Serv.*, CV 01-640-RE, Docket (available with author) (current as of December 1, 2005). The tribes’ legal briefs, expert declarations, and comments during negotiations on remand of the 2000 biological opinion can all be found at the Columbia River Inter-Tribal Fish Commission (CRITFC) website at <http://www.critfc.org> (last visited Dec. 27, 2005).

tribes a property right to harvest salmon in the Columbia River Basin.⁸⁶ In the 1960s, over two decades before the salmon were even listed under the ESA, the runs had diminished considerably due to over-harvest by non-Indians and environmental factors, and the state of Oregon severely curtailed Indian fishing, imposing an undue regulatory burden on the tribes.⁸⁷ Tribes brought litigation to enforce their treaty fishing rights against the state of Oregon, and in the consolidated cases *Sohappy v. Smith* and *United States v. Oregon*, district court Judge Robert Belloni established explicit governing principles for state regulation of treaty harvest in the basin.⁸⁸ The court encouraged active participation of the tribes in managing the fishery and maintained ongoing jurisdiction over the case to resolve disputes over harvest.⁸⁹ Over the years it became clear to the states and tribes that a fish management plan was needed to coordinate the harvest between the treaty and non-Indian fisheries. In 1988, the district court approved such a plan, called the Columbia River Fish Management Plan (CRFMP), which was implemented under the ongoing jurisdiction of the court and stayed in effect until 1998 when it expired on its own terms.⁹⁰ The district court of Oregon has maintained continuing jurisdiction over the litigation and resolves fishing disputes when they are incapable of resolution under cooperative processes.

Under the CRFMP and the *United States v. Oregon* litigation, the tribes gained a formal role as sovereign co-managers of the salmon resource. This structure was firmly in

⁸⁶ See *supra* note 26 and accompanying text.

⁸⁷ See discussion in Wood, *supra* note 4, at 15.

⁸⁸ 302 F. Supp. 899 (D. Or. 1969). This case is often referred to as the *United States v. Oregon* litigation.

⁸⁹ *Id.* at 911-12.

⁹⁰ *United States v. Oregon*, 699 F. Supp. 1456 (D. Or. 1988). The plan was upheld by the Ninth Circuit in *United States v. Oregon*, 913 F.2d 576 (9th Cir. 1990). The plan, though expired, is available on the CRITFC website at <http://www.critfc.org> (last visited Dec. 27, 2005).

place and was part of the “Law of the River” long before the first salmon species were ever listed under the ESA in 1991.⁹¹ Through their fisheries agency, the Columbia River Inter-tribal Fish Commission (CRITFC), the four treaty tribes have developed substantial expertise in all facets of salmon management⁹² and have issued a recovery plan for the salmon that addresses all components of the salmon’s biological needs.⁹³ For the past several years, the CRITFC has produced an operations plan for the Columbia River hydrosystem containing detailed analysis and recommendations on operational changes to improve fish migration through the system.⁹⁴ Not surprisingly, the treaty tribes have sought involvement in the ESA process since the first salmon species were listed and make repeated scientific recommendations to the NMFS on fisheries management.⁹⁵ On two occasions where courts have overturned agencies’ salmon plans, the courts noted the failure to consider tribal science. Indeed, in the first case that overturned the NMFS’ biological opinion on the hydrosystem, Judge Marsh suggested that the NMFS had improperly failed to fully consider “significant information and data from well-qualified

⁹¹ The “Law of the River” refers to the numerous compacts, federal and state laws, court decisions and decrees, contracts, and regulatory guidelines that apply to the Columbia River.

⁹² Charles Wilkinson praises CRITFC’s technical and scientific expertise in salmon management as “literally second to none” and at least on par with state and federal agencies in his leading work. Charles F. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* (1992). Many of the tribal scientists’ technical reports and papers are available on the CRITFC website at <http://www.critfc.org> (last visited Dec. 27, 2005).

⁹³ Columbia River Inter-Tribal Fish Comm’n, *Wy-Kan-Ush-Mi, Wa-Kish-Wit: Spirit of the Salmon: The Columbia River Anadromous Fish Restoration Plan of the Nez Perce, Umatilla, Warm Springs and Yakama Tribes* (1995), available at <http://www.critfc.org> (last visited Dec. 27, 2005).

⁹⁴ See, e.g. Columbia River Inter-Tribal Fish Comm’n, 2005 River Operations Plan (Mar. 25, 2005), available at <http://www.critfc.org> (last visited Dec. 27, 2005). The same website contains operations plans dating back to 2001.

⁹⁵ The tribes are part of the State, Federal, and Tribal Fisheries Agencies Joint Technical Staff, which makes recommendations to the Corps and the NMFS regarding transportation and passage issues. Some of the staff comments are available through the CRITFC website as submissions in the ongoing *National Wildlife Federation v. National Marine Fisheries Service* litigation. See, e.g. Declaration of Frederick E. Olney, Attachment A, Feb. 11, 2005, submitted in *National Wildlife Federation v. National Marine Fisheries Serv.*, CV 01-640-RE (D. Or.), available at <http://www.critfc.org> (last visited Dec. 27, 2005). For further discussion of the tribes’ technical involvement as co-managers, see Wood, *supra* note 37, at 788-90.

scientists such as the fisheries biologists from the states and tribes.”⁹⁶ And in *Northwest Resource Information Center v. Northwest Power Planning Council*, the Ninth Circuit overturned a plan developed by the Northwest Power Planning Council in part because state and tribal recommendations had been discounted without explanation.⁹⁷ Thus, in light of their longstanding role as sovereign co-managers of the fishery, it was no surprise that Judge Redden accorded the tribes a prominent role in the *National Wildlife Federation v. National Marine Fisheries Service* litigation despite their amicus status. The section below examines this tribal role both in terms of the theories asserted and the judicial relief awarded.

3. Rejecting the Diminished Trust as a Framework for ESA §7 Jeopardy Analysis

□ *Dams as part of the natural baseline*. In its 2004 biological opinion, the NMFS took an approach to jeopardy analysis that was unprecedented in at least two fundamental ways. First, the agency tried to solidify the diminished trust model by characterizing the dams as a permanent part of the environment and dismissing as inevitable the majority of their harmful effects. The agency did this by labeling all impacts from the dams’ sheer *existence* as “non-discretionary” and part of a “baseline” that it chose to exclude from

⁹⁶ Idaho Dep’t of Fish & Game v. National Marine Fisheries Serv., 850 F. Supp. 886, 899 (D. Or. 1994), *vacated for mootness & remanded*, 56 F.3d 1071 (9th Cir. 1995) (emphasis added).

⁹⁷ Northwest Resource Info. Ctr. v. Northwest Power Planning Council, 35 F.3d 1371, 1395 (9th Cir. 1994). The Northwest Power Planning Act accords tribes a formal role in developing a regional plan to recovery salmon basin-wide. Pacific Northwest Electric Power Planning and Conservation Act of 1980 (Northwest Power Act), 16 U.S.C. §839b(h)(2)(7) (requiring “due weight” given to recommendations of tribes and other agencies in developing a basin-wide plan). The Ninth Circuit held that tribal scientific recommendations were due a “high degree of deference.” *Northwest Resource Info. Ctr.*, 35 F.3d at 1395.

jeopardy analysis.⁹⁸ In other words, it decided to ignore the aggregate effects of the dams on salmon,⁹⁹ consigning nearly all of the mortality associated with the dams to a safe “baseline” zone outside of the jeopardy analysis. As the court described, “What NOAA has in effect done in the 2004 [biological opinion] is compare the proposed action to the share of the proposed action it chose to re-categorize as part of the environmental baseline, rather than properly evaluating the proposed action in its entirety.”¹⁰⁰ Under the NMFS’ new interpretation it would indeed be hard to imagine a jeopardy finding.

The court gave little deference to the agency’s remodeled jeopardy approach, noting, “When an agency’s new interpretation of a regulation conflicts with its earlier interpretations, the agency is ‘entitled to considerably less deference’ than a consistently-held agency view.”¹⁰¹ The NMFS’ new analysis departed radically from all other prior biological opinions that, though never resulting in any meaningful change to river operations, at least evaluated the dams’ aggregate impacts.¹⁰² Finding the agency’s novel analysis invalid, the court stated:

Under NOAA’s interpretation, an action agency would be able to exempt itself from accountability by characterizing some, even lethal, elements of any proposed action as ‘nondiscretionary.’ The consequences would be, as in the 2004 BiOp, a jeopardy analysis that ignores the reality of past, present, and

⁹⁸ See *National Wildlife Fed’n v. National Marine Fisheries Serv.*, CV 01-640-RE, 2005 U.S. Dist. LEXIS 16345, at *25-26, 40-43 (D. Or. May 26, 2005).

⁹⁹ See *id.* at *40-41.

¹⁰⁰ *Id.* at *43.

¹⁰¹ *Id.* at *39 (citation omitted). In upholding the district court’s June 10, 2005, spill injunction, the Ninth Circuit agreed that the NMFS was not entitled to deference in light of the abrupt change in how the agency interpreted ESA §7 as applied to the Columbia River hydrosystem. See *National Wildlife Fed’n v. National Marine Fisheries Serv.*, 422 F.3d 782, 799 (9th Cir. 2005).

¹⁰² See *National Wildlife Fed’n*, 2005 U.S. Dist. LEXIS 16345, at *40 (noting, “NOAA’s prior BiOps . . . have indeed used the aggregation approach.”).

future effects of federal actions on listed species. NOAA's interpretation conflicts with the structure, purpose, and policy behind the ESA.¹⁰³

□ *Putting a ceiling on recovery.* The NMFS attempted to solidify the diminished trust within the ESA framework in a second way by excluding from its jeopardy analysis any consideration of the impact of the dams on the species' potential for recovery.¹⁰⁴ This too was a dramatic departure from the NMFS' prior approach to jeopardy determinations in the basin.¹⁰⁵ The agency's abrupt turnabout brought into full focus an issue that had been lying beneath the surface of §7 interpretation for years: whether there is "jeopardy" when a species' likelihood for *recovery*--though not necessarily short-term survival--is impaired.¹⁰⁶ By suddenly ignoring the potential for salmon recovery in its jeopardy call, the NMFS in essence consigned the salmon of the basin to minimum survival levels. The action could not have been more clearly intended to provide a regulatory safe harbor to the dams that deplete the salmon asset.¹⁰⁷

Again, the court found the action invalid, withholding the standard amount of deference in light of the agency's abrupt change in position.¹⁰⁸ The court referred to the regulation defining jeopardy and to the NMFS' own Consultation Handbook, both of which it found envisioned consideration of the potential for recovery as part of the

¹⁰³ *Id.* at *36.

¹⁰⁴ *See id.* at *55.

¹⁰⁵ *Id.* at *55-56. For discussion of the NMFS' prior approach, *see* Wood, *supra* note 8, at 624 n.79.

¹⁰⁶ For discussion, *see* Rohlf, *supra* note 50, at 152-53.

¹⁰⁷ Such action seemingly flies in the face of the standard trustee duty to recover a diminished asset. *See* Wood, *supra* note 8, at 612 (applying traditional trustee duty to recover corpus of trust to wildlife law).

¹⁰⁸ *National Wildlife Fed'n*, 2005 U.S. Dist. LEXIS 16345, at *58.

jeopardy analysis.¹⁰⁹ The ruling represents a major step in redirecting agency action towards an abundant trust model.

□ *The role of treaty rights.* Treaty rights were not directly at issue in the *National Wildlife* litigation. Nevertheless, treaty rights form the backdrop to all salmon litigation because tribes depend on the salmon for harvest and any meaningful future exercise of treaty rights in the basin requires significant recovery of the species. The NMFS would have used the ESA--the primary regulatory tool available--to withhold protection for the species, thereby setting up a collision course with treaty rights. While the district court only tangentially explored the relationship between treaty rights and ESA standards,¹¹⁰ both Judge Redden's opinion and the Ninth Circuit opinion affirming his decision recognized treaty rights as an important part of the context of salmon recovery.¹¹¹

As a practical matter, treaty rights can only be enjoyed if recovery brings the salmon populations back to harvestable levels--whatever level that may be in light of tribal needs.¹¹² In *National Wildlife Federation*, Judge Redden drew the recovery mandate from ESA §7 regulations and case law.¹¹³ Though his opinion did not approach

¹⁰⁹ *Id.* at *57 (construing 50 CFR §402.02 and NOAA & USFWS, Endangered Species Consultation Handbook – Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act 4-35 (1998)). The court also found applicable the reasoning in *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1069 (9th Cir. 2004) (requiring the Services to determine whether proposed actions will destroy or adversely modify critical habitat necessary for the recovery, as well as survival, of species). *National Wildlife Fed'n*, 2005 U.S. Dist. LEXIS 16345, at *57.

¹¹⁰ See *National Wildlife Fed'n*, 2005 U.S. Dist. LEXIS 16345, at *60 (finding the NMFS appropriately included tribal harvest rights in baseline when assessing species survival).

¹¹¹ *Id.* at *60-62; *National Wildlife Fed'n v. National Marine Fisheries Serv.*, 422 F.3d 782, 789 (9th Cir. 2005).

¹¹² The tribal recovery plan calls for rebuilding salmon populations to annual run sizes of four million above Bonneville Dam within 25 years to “support tribal ceremonial, subsistence and commercial harvests.” <BI>Wy-Kan-Ush-Mi, Wa-Kish-Wit<D>, *supra* note 93, at 1.

¹¹³ See *supra* note 109 and accompanying text.

the thorny issue of how much recovery is adequate, the ESA certainly leaves room for an interpretation consistent with treaty rights. The ESA contemplates setting recovery goals at levels that will permit delisting of the species.¹¹⁴ Delisting may only occur when the species has stabilized to the point that the various factors that prompted listing in the first place will not put the species in danger of extinction. Among these factors is any “man-made” factor that affects the species’ viability.¹¹⁵ Since harvest is a “man-made” factor and treaty rights are property rights that play a central role in the Law of the River, the NMFS can and arguably should account for treaty harvest in setting recovery goals.¹¹⁶ Under this interpretation, the species would not be delisted until the tribes reclaimed their full harvest share. Until the time of delisting, the ESA regulation would continue to impose an appropriate conservation burden on other known sources of mortality, including the hydrosystem, in order to rebuild fish stocks. By finding that the ESA requires recovery analysis as part of the jeopardy inquiry under §7, the court rendered a decision not only consistent with the statute and recent case law, but also with treaty rights.

B. Meaningful Injunctive Relief

1. Injunctive Relief Generally

¹¹⁴ See 50 C.F.R. §402.02 (“‘Recovery’ means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.”); see also *supra* note 41.

¹¹⁵ See 16 U.S.C. §1533(a)(1)(E).

¹¹⁶ The NMFS already recognizes that tribal harvest should be considered part of the baseline in assessing jeopardy. See *supra* note 110.

The remedy for ESA violations is injunctive relief.¹¹⁷ As discussed further below, the *National Wildlife Federation* court ordered in-river operational changes to the hydrosystem in the form of spills and remanded the biological opinion to the NMFS with instructions to follow a detailed process of consultation. During the period of remand, the court is considering requests for interim injunctive relief submitted by the plaintiffs and tribes.¹¹⁸ In framing the remand process, the court awarded the treaty tribes a significant role as sovereign co-managers of the resource, despite their mere amicus status in this particular litigation.¹¹⁹ To fully appreciate the importance of this tribal role in the broader context of ESA implementation in the basin, it is important to understand the inherent tensions courts face in ordering injunctive relief under the ESA.¹²⁰

Such relief has different ramifications in the two broad contexts of ESA violations. In one context, the federal action subject to §7 represents altogether new action that carries potential for harm. For example, an action agency may propose a timber sale, the construction of a road, or approval of a permit for a new polluting facility. In these cases the injunction itself preserves the status quo and does not prompt any fundamental on-the-ground changes. One could look at such injunctions as protecting current natural assets and precluding movement towards a diminished natural trust model prior to compliance with the ESA.

In the second context, the proposed action subject to §7 consultation is the continuation of, rather than the initiation of, harmful action. Hydrosystem operations fall

¹¹⁷ See *infra* notes 123-24 and accompanying text.

¹¹⁸ See *National Wildlife Fed'n v. National Marine Fisheries Serv.*, CV 01-640-RE, Opinion and Order, slip op. at 1 (D. Or. Nov. 2, 2005). On December 29, 2005, the court ordered injunctive relief in the form of precise spill measures for the late spring, 2006. See *supra* note 83.

¹¹⁹ See *infra* Part I.B.2.b.

¹²⁰ For general discussion, see Wood, *supra* note 2, at part V.B.

into this category. In this context, the “action” trigger for §7 consultation is the agency’s operations plan that is subject to approval annually or during other intervals. In the case of Columbia Basin dam operations, the river-managing agencies have already depleted the natural trust by harming or destroying salmon runs over a period of several decades. Continued operation of the dams under the current operational regime risks eradicating the natural asset altogether, and only the swift relief afforded by an injunction may prevent irrevocable losses.¹²¹ In this context the court’s role is not to protect the status quo, which is clearly harmful to the species, but to require agencies to take steps in the direction of stabilization or recovery of the species. In other words, the court must force in-river action away from the Diminished Trust towards the Abundant Trust.

No matter which context a judge is faced with, a meaningful injunctive remedy is mandatory where necessary to effectuate the congressional purposes behind the ESA. In this important respect, the ESA context differs from other statutory realms. Traditionally, courts have had discretion to balance equities and hardships in deciding whether to issue injunctions.¹²² But in the landmark case *Tennessee Valley Authority v. Hill*, the U.S.

¹²¹ See *National Wildlife Fed’n v. National Marine Fisheries Serv.*, 422 F.3d 782, 796 (9th Cir. 2005) (noting district court’s conclusion that the “continuation of the status quo could result in irreparable harm to a threatened species,” and stating, “Those are precisely the circumstances in which our precedent indicates that the issuance of an injunction is appropriate.”); *National Wildlife Fed’n v. National Marine Fisheries Serv.*, CV 01-640-RE, 2005 U.S. Dist. LEXIS 16352 at *13 (D. Or. June 10, 2005) (“[T]he DAMS strongly contribute to the endangerment of the listed species and irreparable injury will result if changes are not made.”)(capitalization in original). Courts have recognized that other basins face a similar extinction crisis. See, e.g., *American Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp. 2d 230, 259 (D. D.C. 2003) (“Given the extremely weakened state of the pallid sturgeon population on the Missouri River, the Court finds that any potential harm from delaying implementation of [a more natural flow regime] is irreparable and must be avoided.”); *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1116-17 (10th Cir. 2003) (reviewing the Bureau of Reclamation’s compliance with the ESA for water withdrawals from Rio Grande Basin, noting: “In crafting [injunctive relief in the form of water flows], the district court underscored the ‘urgency of the situation’ [as] ‘the future of the Rio Grande silver [sic] minnow and the Middle Rio Grande Valley stand at imminent risk.’”), *vacated as moot* *Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215 (10th Cir. 2004).

¹²² *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194, 57 L. Ed. 2d 117, 98 S. Ct. 2279 (1978).

Supreme Court declared that courts lack the discretion to balance public harms against the loss of species in determining whether an injunction should issue.¹²³ The Ninth Circuit has consistently underscored the mandatory nature of injunctive relief under the ESA.¹²⁴ The strict approach towards injunctive relief in the ESA context makes considerable sense because, after all, a substantive violation of the ESA §7 mandate signals a likelihood that the particular federal action may send the species into extinction, causing a permanent loss to the present and future generations. But despite the Supreme Court's strict command that applies across the full realm of ESA cases, the two contexts described above differ in the degrees of strain they impose on courts in crafting the injunctive relief remedy.

Where the status quo favors the species--that is, where the federal action threatens to diminish a part of the existing Natural Trust--courts have not hesitated to impose sweeping injunctions against the action and remand the matter to the FWS or NMFS for consultation in compliance with §7. The ramifications of such injunctions can be quite dramatic: in the 1990s, for example, courts shut down huge expanses of forest for failure to comply with ESA consultation requirements.¹²⁵ An injunction in this context puts the court in a passive position because the court simply returns the proposed action to the

¹²³ *Id.* (“Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities. . . .”).

¹²⁴ *National Wildlife Fed'n*, 422 F.3d at 793-794 (“The traditional preliminary injunction analysis does not apply to injunctions issued pursuant to the ESA.”); *National Wildlife Fed'n v. Burlington N.R.R., Inc.*, 23 F.3d 1508, 1510 (9th Cir. 1994); *Pacific Coast Federation of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1095 (Oct. 18, 2005) (injunctive relief necessary during remand for ESA consultation in river operation context).

¹²⁵ *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) (enjoining the U.S. Forest Service from proceeding with projects under land resource management plans prior to consultation with the FWS under the ESA); *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992) (enjoining the BLM from new timber sales until consultation under §7 was completed); *see also Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1975) (enjoining construction of road until agency prepared biological assessment).

Service for consultation or re-consultation as required under the ESA. Other than stabilizing the status quo, courts issuing this sort of relief do not dictate actions on the ground but rather leave it up to the Service and action agencies to reconsider the matter. In so doing, there is little danger that the court will invade agency management prerogatives. If the action agencies and the Service present another flawed proposal or analysis, the court can simply remand the matter again. Where the status quo favors the species, there is no ecological loss from tremendous waste of time, because time is on the species' side.

In the context of river operations, however, it is the status quo, and not any *proposed action*, that threatens the species' existence.¹²⁶ Time is an enemy to the species in the Diminished Trust context: the longer the harmful operations continue, the more damage presumably occurs.¹²⁷ At some point, the status quo threatens irrevocable losses and may send the species into extinction. A court faced with a severely diminished trust does not have the luxury of being able to allow extended remand periods, much less indulge in repeated remands to the agency. This is particularly true if the remand is not likely to yield a significant change in the harmful status quo. In the river operations context, the NMFS is subject to enormous pressure both within the federal family and from outside constituencies to not force changes under the ESA.¹²⁸ This may leave an

¹²⁶ See *National Wildlife Fed'n*, 422 F.3d at 796 (“[O]ur situation is unlike that of a timber sale, which can be postponed in order to permit the agency to correct the ESA violations before the planned operation commences. . . . Here, the district court was faced with a continuing operation that it had concluded would cause irreparable harm to threatened species.”).

¹²⁷ As the Ninth Circuit stated in the context of pesticide use near salmon streams, “It is the very maintenance of the ‘status quo’ that is alleged to be harming the endangered species.” *Washington Toxics Coalition v. Environmental Protection Agency*, 413 F.3d 1024, 1035 (9th Cir. 2005).

¹²⁸ As Judge Redden noted in his remand order, “If the Executive and Legislative Branches do not allow [NMFS] to follow the law of the land, [NMFS] and the Action Agencies will fail again to take the steps that are plainly necessary to do what the ESA requires and what the listed species require in order to survive

administrative vacuum of sorts: on remand, no government agency with control over the river operations is inclined to step up to the duties imposed by the ESA.¹²⁹

A court facing a severely diminished trust thus faces a difficult dilemma. On one hand it is up to the courts to prevent species losses by offering meaningful relief for ESA violations.¹³⁰ A court that fails to award meaningful injunctive relief effectively insulates the agencies' actions from ESA standards, and such de facto judicial immunity risks violating the separation of powers between the three branches of government.¹³¹ On the other hand, judges generally view "running the river" an agency prerogative and rightly feel that they lack the scientific or technical expertise to make operational judgments.¹³²

and recover." National Wildlife Fed'n v. National Marine Fisheries Serv., CV 01-640-RE, Opinion and Order of Remand, slip op. at 8 (D. Or. Oct. 7, 2005).

¹²⁹ Of course, this may not be the case in all contexts. But courts are beginning to recognize agency recalcitrance as a dynamic that affects the implementation of environmental laws. *See, e.g.*, Rio Grande Silvery Minnow v. Keys, 333 F.3d 1109, 1117 (10th Cir. 2003) ("FWS' compliance with NEPA and the ESA has been marked by massive delays and inadequate decision-making," which fully exacerbated the status of the Rio Grande silvery minnow. "These delays and irrational decisions come at the expense of the Silvery Minnow, officially endangered for nearly eight years.") (*citing* Middle Rio Grande Conservancy Dist. v. Norton, 294 F.3d 1220, 1225-26 (10th Cir. 2002)); Alaska Center for the Environment v. Browner, 20 F.3d 981, 983 (9th Cir. 1994) ("EPA had engaged in a pattern of total inaction in carrying out its duties under the [Clean Water Act] that extended over a period of approximately 12 years."); Sierra Club v. Thomas, 105 F.3d 248, 251 (6th Cir. 1997), *vacated on ripeness grounds*, Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 118 S. Ct. 1665, 140 L. Ed. 2d 921 ("[F]orest planning, as practiced by the Forest Service, is a political process replete with opportunities for the intrusion of bias and abuse.").

¹³⁰ As the Ninth Circuit stated in *Alaska Center for the Environment*:

In enacting environmental legislation, and providing for citizen suits to enforce its directives, Congress can only act as a human institution, lacking clairvoyance to foresee the precise nature of agency dereliction of duties that Congress prescribes. *When such dereliction occurs, it is up to the courts in their traditional, equitable, and interstitial role to fashion the remedy.*

Alaska Center for the Environment, 20 F.3d at 987 (emphasis added).

¹³¹ *See* Tennessee Valley Authority v. Hill, 437 U.S. 153, 194, 57 L. Ed. 2d 117, 98 S. Ct. 2279, 2301-02 (1978) (failure to issue an injunction under the ESA would repudiate congressional intent and breach the separation of powers between the branches of government); *c.f.* Sierra Club v. Thomas, 105 F.3d at 250 (reviewing Forest Service action and noting, "While it is generally accepted that federal agencies are entitled to a presumption of good faith and regularity in arriving at their decisions, that presumption is not irrebuttable. We would be abdicating our Constitutional role were we simply to 'rubber stamp' this complex agency decision rather than ensuring that such decision is in accord with clear congressional mandates. It is our role to see that important legislative purposes are not lost or misdirected in the vast hallways of the federal bureaucracy.").

¹³² *See, e.g.*, Idaho Dep't of Fish & Game v. National Marine Fisheries Serv., 850 F. Supp. 886, 889 (D. Or. 1994) (rejecting plaintiff's request for an injunction against barging "in order to avoid judicial micro-

Courts must also be careful not to invade the legitimate management prerogatives of the Executive Branch.¹³³

Using their traditional equitable authority,¹³⁴ courts are just beginning to adapt to the challenges of ESA enforcement by formulating injunctions that provide in-river or on-the-ground relief during periods of remand. This trend is apparent in several ESA cases preceding the *National Wildlife Federation* litigation. In three ESA cases challenging federal hydrosystem operations--one in the Missouri Basin, one in the Klamath Basin, and one in the Rio Grande Basin--federal district judges ordered operational changes in the dams to provide interim relief to listed species during remands to the Services for further consultation or revision of biological opinions under §7.¹³⁵ In another case challenging EPA's failure to consult with the NMFS prior to registering pesticides that could harm salmon in the Pacific Northwest, a district court banned the application of pesticides near salmon bearing streams and ordered marketplace warnings

management of the Columbia River power system"); *see also* *Natural Resources Defense Council v. Hodel*, 624 F. Supp. 1045, 1062 (D. Nev. 1985).

¹³³ *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 56, 124 S. Ct. 2373, 2381, 159 L. Ed. 2d 137 (2004) (noting administrative law principle to "protect agencies from undue judicial interference with their lawful discretion and to avoid judicial entanglement in abstract policy disagreements which courts lack the expertise and information to resolve"); *Alaska*, 20 F.3d at 987 (in fashioning injunctive relief, "the court is mindful not to intrude upon the agency's realm of discretionary decision making.") (citing district court opinion).

¹³⁴ *See Alaska Center for the Environment*, 20 F.3d at 986 ("The district court has broad latitude in fashioning equitable relief when necessary to remedy an established wrong.").

¹³⁵ *See Pacific Coast Federation of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1128, 1250 (N.D. Cal. 2001) (ordering flows in Klamath River); *Pacific Coast Federation of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1095 (9th Cir. 2005) (remanding to district court to provide interim injunctive relief for depleted Klamath River flows pending §7 compliance); *American Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp. 2d 230, 262 (D. D.C. 2003) (ordering more natural flow regime in Missouri River); *American Rivers v. U.S. Army Corps of Engineers*, 274 F. Supp. 2d 62, 70 (D.D.C. 2003) (finding the Corps in contempt of court's order to implement certain water flows on the Missouri River for the protection of species and declaring daily fine of \$500,000 for continued noncompliance); *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109, 1119 (10th Cir. 2003) (affirming district court's injunction requiring flows in Rio Grande and reservoir release pending compliance with the ESA), *vacated as moot* by 355 F.3d 1215 (10th Cir. 2004).

of hazards to salmon associated with pesticides.¹³⁶ The Ninth Circuit gave a resounding affirmation of the injunction, noting that the appropriate remedy for violations of the ESA consultation requirements is an injunction pending compliance with the ESA.¹³⁷

2. The Remedy in *NWF v. NMFS* and the Tribal Role

□ *Injunctive relief in the form of spill*. Facing a dangerously diminished trust and evidence that the species were at risk of extinction if river operations continued without change,¹³⁸ Judge Redden ordered spill measures to assist baby salmon in their migration to the Columbia River.¹³⁹ On July 26, 2005, the Ninth Circuit upheld the spill order.¹⁴⁰ The spill remedy imposed by the court was a reasonable one. The measure had been generated out of the ESA process itself and incorporated into the NMFS' 2000 biological opinion as an RPA,¹⁴¹ but the action agencies later refused to implement it.¹⁴² The court

¹³⁶ *Washington Toxics Coalition v. Environmental Protection Agency*, No. C01-132C, 2003 U.S. Dist. LEXIS 26088 (W.D. Wash. Aug. 8, 2003), *affirmed by* *Washington Toxics Coalition v. Environmental Protection Agency*, 413 F.3d 1024 (9th Cir. 2005).

¹³⁷ *Washington Toxics*, 413 F.3d at 1035.

¹³⁸ *National Wildlife Fed'n v. National Marine Fisheries Serv.*, CV 01-640-RE, 2005 U.S. Dist. LEXIS 16352 at *13 (D. Or. June 10, 2005) (“As currently operated, I find that the DAMS strongly contribute to the endangerment of the listed species and irreparable injury will result if changes are not made.”).

¹³⁹ *Id.* at *14-17. The court had ordered spill the prior summer as well. *See National Wildlife Fed'n v. National Marine Fisheries Serv.*, CV 01-640-RE, 2004 U.S. Dist. LEXIS 15239 at *15 (D. Or. July 29, 2004).

¹⁴⁰ *National Wildlife Fed'n v. National Marine Fisheries Serv.*, 422 F.3d 782, 800 (9th Cir. 2005) (also remanding to the district court to consider the question of whether the injunction should be more narrowly tailored or modified in light of subsequent information).

¹⁴¹ *See id.* at 797 (upholding spill injunction, stating, “The district court’s action was in accord with the consulting agency’s findings and recommendations in its 2000 [biological opinion], which was the only operative document at the time, and was in conformance with the historical belief that spillway passage produced the highest survival of the species.”).

¹⁴² *See National Wildlife Fed'n v. National Marine Fisheries Serv.*, CV 01-640-RE, 2004 U.S. Dist. LEXIS 15239 at *2-3 (D. Or. July 29, 2004). The spill measure was accorded “the highest priority” in the 2000 biological opinion. *Id.* at *2 (citing 2000 biological opinion). On July 29, 2004, the court issued an injunction forcing the Corps to implement the spill. *Id.* at *15.

noted that prior spills had produced beneficial results for salmon according to the government's own documents.¹⁴³ The plaintiffs had proposed, in addition to spill, measures to increase the water flow rate in the river so that juveniles would have a shorter transportation time to the sea, but Judge Redden rejected that remedy, finding that it involved scientific questions he could not resolve.¹⁴⁴

In light of the Supreme Court's command in *Tennessee Valley Authority v. Hill* that injunctive relief is mandatory where necessary to preserve the species, the court seemed well justified in concluding that simply returning the process to the NMFS for another round of consultation--without some immediate spill relief--could leave the species in jeopardy. Judge Redden set the context for his spill order by detailing the "pattern of earlier failures by [the NMFS] to comply with the ESA."¹⁴⁵ The ESA litigation over Columbia River salmon had been ongoing for 11 years,¹⁴⁶ and the NMFS had rendered four biological opinions,¹⁴⁷ all without any measurable improvement to salmon. The federal district court of Oregon had twice held the agency's biological opinions invalid and remanded them to the agency.¹⁴⁸ Judge Redden himself had

¹⁴³ The Ninth Circuit found that fact important in upholding Judge Redden's 2005 spill injunction. *See National Wildlife Fed'n*, 422 F.3d at 797. In a more recent opinion and order, Judge Redden noted that the court-ordered summer spill of 2005 "improved the survival rate of salmon passing the dams compared to previous years," according to counts produced by the Fish Passage Center. *National Wildlife Fed'n v. National Marine Fisheries Serv.*, CV 01-640-RE, Opinion and Order, slip op. at 16 (D. Or. Dec. 29, 2005).

¹⁴⁴ *National Wildlife Fed'n v. National Marine Fisheries Serv.*, CV 01-640-RE, 2005 U.S. Dist. LEXIS 16352, at *16 (D. Or. June 10, 2005) (asking parties to collaborate on the flow measure during the remand period, stating, "I am convinced that accomplishment of this goal requires further study and consultation.").

¹⁴⁵ *National Wildlife Fed'n v. National Marine Fisheries Serv.*, CV 01-640-RE, Opinion and Order of Remand, slip op. at 5 (D. Or. Oct. 7, 2005).

¹⁴⁶ *See National Wildlife Fed'n v. National Marine Fisheries Serv.*, CV 01-640-RE, 2005 U.S. Dist. LEXIS 16345, at *6 (D. Or. May 26, 2005).

¹⁴⁷ *Id.* at *94-101 (Attachment 2, reviewing biological opinions).

¹⁴⁸ *See National Wildlife Fed'n v. National Marine Fisheries Serv.*, 254 F. Supp. 2d 1196 (D. Or. 2003); *Idaho Dept. of Fish & Game v. National Marine Fisheries Serv.*, 850 F. Supp. 886, 893 (D. Or. 1994), *vacated as moot*, 56 F.3d 1071 (9th Cir. 1995).

provided the federal government a year and a half to reconsider its 2000 biological opinion.¹⁴⁹ When the federal government finally did present a new biological opinion to the court, the analysis represented a complete reversal of its prior approach, one that disregarded the effects of the dams and tossed out any recovery goals.¹⁵⁰ As Judge Redden noted in his later order, “the entire remand time was lost and wasted.”¹⁵¹ He explained:

I recognize [NMFS] alone is charged with the responsibility of drafting a valid biological opinion. So far, they have not succeeded. Courts do defer to administrative agencies, and they should, and I have. Experience, however, shows that the court should, and sometimes must, be more than a passive participant in the remand process. . . . The government’s inaction appears to some parties to be a strategy intended to avoid making hard choices and offending those who favor the status quo. *Without real action from the Action Agencies, the result will be the loss of the wild salmon.*¹⁵²

The treaty tribes provided crucial expertise in the form of expert declarations that the court relied on in its June 2005 spill order.¹⁵³ Developing measures for in-river

¹⁴⁹ See *National Wildlife Fed’n*, 2005 U.S. Dist. LEXIS 16345, at *8.

¹⁵⁰ See *id.* at *10-11 (“Rather than implementing its promises on remand, [NMFS] had abandoned the approach of the 2000 [biological opinion] and instead the 2004 [biological opinion] relied on an analytical framework [NMFS] had not used before.”).

¹⁵¹ *National Wildlife Fed’n v. National Marine Fisheries Serv.*, CV 01-640-RE, Opinion and Order of Remand, slip op. at 4 (D. Or. Oct. 7, 2005).

¹⁵² *Id.* at 8 (emphasis added).

¹⁵³ See *National Wildlife Fed’n v. National Marine Fisheries Serv.*, CV 01-640-RE, Docket # 512-516 (Declarations of Frederick E. Olney, Thomas K. Lorz, Robert Heinith, Rishi Shena, Chris Brun), *cited in* Treaty Tribes’ Joint Memorandum in Opposition to Federal Defendants’ Motion to Strike 15 (2005 Summary Judgment) (Mar. 3, 2005) (on file with author). The Olney declaration on the benefits of spill was cited by the Ninth Circuit in affirming Judge Redden’s 2005 spill order:

The district court’s selection of a remedy of selected spills was based on expert opinion. . . .

Frederick Olney, a former fishery biologist for the U.S. Fish and Wildlife Service with thirty-five years of experience in the field, testified by affidavit that spilling water for fish passage was a “cornerstone of protection and mitigation programs” in the area and that there was “regional agreement that spill is the safest passage route through mainstream hydroelectric projects.”

National Wildlife Fed’n v. National Marine Fisheries Serv., 422 F.3d 782, 797 (9th Cir. 2005) (citing declaration). The tribes continue to offer expert evidence supporting interim injunctive relief during the

improvements is a highly technical process. Because the court lacks its own independent scientific expertise on salmon recovery,¹⁵⁴ it can only fully evaluate the technical assumptions on which the NMFS based its biological opinion if it receives scientific analysis and data from credible sovereigns and parties in the process of litigation. In affirming Judge Redden's June 10, 2005, injunction, the Ninth Circuit noted that the NMFS has lost much of the deference it would traditionally be accorded because of its abrupt change of position in analyzing jeopardy from hydrosystem operations.¹⁵⁵ Moreover, as sovereign co-managers with expertise in all facets of salmon recovery, the tribes are positioned to offer technical information into a court proceeding even as amicus parties, particularly since they have developed a river operations plan that serves as an alternative to the NMFS' recommendations for operating the hydrosystem.¹⁵⁶

The contribution of tribal science may prove a crucial step in releasing ESA implementation from the political manipulation that has plagued it for 15 years. Because the NMFS presents only one view of salmon recovery that favors the status quo, the tribal science is important to understanding the alternatives available for river operations. The

process of remand. *See* Treaty Tribes' Memo in Support of Motion for Further Injunctive Relief (2006 Operations), CV 01-640-RE (D. Or., Nov. 1, 2005) (on file with author). On December 29, 2005, the court ordered limited spill measures for late spring, 2006, relying in part on evidence submitted by the tribes' expert, Thomas Lorz. *National Wildlife Fed'n v. National Marine Fisheries Serv.*, CV 01-640-RE, Opinion and Order, slip op. at 8-9 (D. Or. Dec. 29, 2005). The court denied relief requested by the tribes and National Wildlife Federation in the form of certain augmented flow measures. *Id.* at 12-16.

¹⁵⁴ The court does maintain, however, a technical advisor, Dr. Howard Horton, to assist it with understanding the highly technical issues involved in the salmon litigation. *See* *National Wildlife Fed'n v. National Marine Fisheries Serv.*, CV 01-640-RE, Opinion and Order, slip op. at 5 (D. Or. Nov. 2, 2005). The court declined to appoint experts pursuant to Fed. R. Civ. P. Rule 706(a), and instead will continue to evaluate "dueling" expert declarations submitted by the parties. *Id.*

¹⁵⁵ *See* *National Wildlife Fed'n*, 422 F.3d at 799, stating:

As the district court noted, NMFS had completely reversed course in its 2004 BiOp. . . . The district court had rejected the underlying premise of the agency's methodology and the 2004 BiOp. Therefore, there was no formal agency finding to which deference might arguably be owed.

¹⁵⁶ *See supra* notes 92-97 and accompanying text.

NMFS places heavy reliance on transporting juvenile smolts to the ocean by barge or truck (the “transportation” option, which allows for current dam and reservoir conditions), while the tribes argue for more alteration of in-river conditions (by spilling water over dams, lowering reservoirs, and even breaching lower Snake River dams) to create a more natural river regime.¹⁵⁷

As might be expected, the federal defendants objected strenuously to the tribes’ offered declarations and made a motion to strike them on the basis that they exceeded the traditional amicus role and were outside the administrative record.¹⁵⁸ Judge Redden denied the motion, holding:

The court . . . notes the Tribes, in one form or another, have been involved in FCRPS endangered species issues for many years. It would be counterproductive to exclude them from meaningful participation in this case, which includes the ability to present both legal arguments and extra-record materials that are of assistance to the court and that fall within the limited scope of the court’s judicial review under the APA.¹⁵⁹

□ *The remand process of consultation.* Beyond imposing a spill injunction, Judge Redden also remanded the biological opinion to the NMFS for reconsideration with detailed procedural steps and timeframes in an October 7, 2005, order.¹⁶⁰ Though he did not vacate the 2004 biological opinion, the judge made clear that the NMFS would have to

¹⁵⁷ See Treaty Tribes’ Memo in Support of Motion for Further Injunctive Relief (2006 Operations), CV 05-0023-RE (D. Or. Nov. 1, 2005) (on file with author); <BI>CRITFC, 2005 River Operations Plan<D>, available at <http://www.critfc.org> (last visited Dec. 27, 2005); for discussion, see Wood, *supra* note 2, at 226-29.

¹⁵⁸ See Memorandum of Points and Authorities in Support of Federal Defendants’ Motion to Strike Plaintiffs’ and Amici’s Extra-Record Materials and Briefs, National Wildlife Federation v. National Marine Fisheries Serv., CV 01-640-RE (D. Or. Feb. 25, 2005) (on file with author).

¹⁵⁹ National Wildlife Fed’n v. National Marine Fisheries Serv., CV 01-640-RE, Opinion and Order, slip op. at 9 (D. Or. Apr. 8, 2005).

¹⁶⁰ National Wildlife Fed’n v. National Marine Fisheries Serv., CV 01-640-RE, Opinion and Order of Remand (D. Or. Oct. 7, 2005).

reformulate its approach to comport with the mandate of the ESA, and do so without delay.¹⁶¹ In charting a remand consultation process, Judge Redden required the NMFS to involve the tribes as co-managers of the fishery, stating that “collaboration with the sovereign parties is necessary and must occur.”¹⁶² Citing the NMFS’ longstanding failure to carry out the §7 mandate, he commented, “The many failures in the past have taught us that the preparation or revision of [NMFS’] biological opinion on remand must not be a secret process with a disastrous surprise ending. . . .”¹⁶³ He ordered the NMFS to prepare a new biological opinion consistent with his order within one year, but indicated that he would provide an extension if needed in order to engage in “good faith” collaboration.¹⁶⁴ During the one-year remand period, the NMFS must provide the court, parties, and amici, including the tribes, written progress reports, the first of which must contain information on: (1) the legal framework the NMFS intends to use in its jeopardy analysis; (2) the nature and scope of any proposed agency action and/or RPA; and (3) the NMFS’ plan for collaboration with the sovereign entities. Under the court’s order, parties and amici will have the opportunity to comment on the progress report, and the court will hold a status conference shortly after comments are filed.¹⁶⁵

Not surprisingly, the federal defendants objected to the court’s order, claiming that requiring the NMFS to formally involve the states and tribes while it modifies the

¹⁶¹ *Id.* at 4 (“I should not and will not, however, allow another loss of valuable time as occurred during the remand of the [2000 biological opinion].”). Judge Redden gave NMFS and the action agencies one year to develop a new biological opinion. *Id.* Though the federal government argued rigorously for more time, Judge Redden was clearly influenced by the NMFS’ past delays. *See id.* (“I do not believe a remand period of more than one year is appropriate considering past actions on remand.”).

¹⁶² *See id.*

¹⁶³ *Id.* at 8.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 12. Judge Redden ordered that the required collaboration during consultation be geared toward developing items to be included in the proposed action, clarifying policy issues, and reaching agreement or narrowing the areas of disagreement on scientific and technical information. *Id.*

biological opinion during the remand period falls outside the court's authority under the ESA.¹⁶⁶ The ESA gives no express role to tribes in the §7 consultation process. However, nothing in the ESA precludes such active participation, and in fact the Secretaries of Commerce and Interior issued a Joint Secretarial Order that requires consultation where tribal assets are at stake.¹⁶⁷ Moreover, §7 has been judicially interpreted to provide a direct role for tribes and states where they have applicable expertise. That section expressly directs the Services to make their jeopardy determinations using the "best scientific and commercial data available."¹⁶⁸ In reviewing the NMFS' 1993 biological opinion on the Columbia River hydrosystem, the district court in *Idaho Department of Fish and Game v. National Marine Fisheries Service* noted that the "best scientific and commercial data" standard amounts to a "substantive obligation."¹⁶⁹ While iterating the standard deference doctrine that favors the NMFS, that court nevertheless held that the 1993 no-jeopardy biological opinion was arbitrary and capricious because the NMFS had, among other things, failed to adequately consider

¹⁶⁶ Defendants' Response to Cross-Proposals for Remand Order, *National Wildlife Federation v. National Marine Fisheries Serv.*, CV 01-640-RE, slip op. at 8 (D. Or. Sept. 27, 2005). The federal defendants argued that the court would exceed its jurisdiction if it ordered a "binding process for resolving the scientific or technical issues that may arise during the course of preparing a new biological opinion." *Id.* at 8-9. In their view, while the federal agencies may "voluntarily agree to collaborative discussions," the duties the NMFS is charged with under the ESA "may not be delegated to outside parties." *Id.* While the federal defendants promised to engage in "voluntary discussions with the sovereigns regarding . . . preparation of the biological opinion," they maintained that "[t]he Court cannot simply order a 'collaboration' that Congress did not authorize." *Id.* at 9.

¹⁶⁷ U.S. Departments of Interior and Commerce, Joint Secretarial Order #3206: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (1997), available at <http://endangered.fws.gov/tribal/Esatribe.htm> (last visited Dec. 27, 2005). Principle 1 states: "Whenever the agencies, bureaus, and offices of the Departments are aware that their actions planned under the [ESA] may impact tribal trust resources, the exercise of tribal rights, or Indian lands, they shall consult with, and seek the participation of, the affected Indian tribes to the maximum extent practicable." *Id.* at 4.

¹⁶⁸ 16 U.S.C. §1536 (a)(2).

¹⁶⁹ *Idaho Dep't of Fish & Game v. National Marine Fisheries Serv.*, 850 F. Supp. 900 (D. Or. 1994), vacated as moot, 56 F.3d 1071 (9th Cir. 1995).

significant information and data from fisheries biologists in state and tribal agencies.¹⁷⁰

Because the “best scientific and commercial data” standard forms an independent measure against which to judge the adequacy of §7 consultation, the *National Wildlife Federation* court appears to have acted well within its authority to order a remand process that would assure consultation with tribal and state co-managers.¹⁷¹

□ *The prospect of “running the river.”* In his remand order of October 7, 2005, Judge Redden warned that if the NMFS and the action agencies “fail again to take the steps that are plainly necessary to do what the ESA requires and what the listed species require in order to survive and recover,” he would vacate the biological opinion, subjecting the action agencies to immediate liability for taking species under §9 of the ESA.¹⁷² In that event, he said, “the courts would be required to ‘run the river.’”¹⁷³ Noting that all three branches of government “abhor such action by the courts,” and that “such a dysfunction

¹⁷⁰ *Id.* at 900. The decision was also based on the NMFS’ failure to consider relevant facts and adequately explain its preference for a certain predictive model. *Id.* at 893, 890.

¹⁷¹ Of course, the court could have allowed the NMFS a free reign to design its own process on remand, in which case the court could simply make a post-hoc determination as to whether the NMFS relied on best available science. But because of the temporal urgency of providing relief to salmon, this option is not as practical as court-imposed measures to *assure* adequate consultation during this next remand. As the court noted in *Thomas v. Peterson*:

[T]he strict substantive provisions of the ESA justify *more* stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions. . . . If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA’s substantive provisions will not result. The latter, of course, is impermissible.

753 F.2d 754, 764 (9th Cir. 1985) (emphasis in original).

¹⁷² *National Wildlife Fed’n v. National Marine Fisheries Serv.*, CV 01-640-RE, Opinion and Order of Remand, slip op. at 6 (D. Or. Oct. 7, 2005) (referring to 16 U.S.C. §1538, prohibiting “take” of endangered species).

¹⁷³ *Id.*

of government is not a rational option,” he urged the NMFS to cooperate with the sovereigns and other parties to produce a legally valid biological opinion.¹⁷⁴

While clearly a last resort, the court’s warning of running the river is backed up by experience.¹⁷⁵ Since *United States v. Oregon* was decided in 1969, the federal district court of Oregon has maintained ongoing jurisdiction to supervise harvest management, a highly technical area in itself.¹⁷⁶ In essence, the court was well engaged in some aspects of “running the river” long before the ESA came into play. The necessity of judicial intervention at that time was caused by recalcitrant state agencies that had exclusive control over harvest management and refused to provide an adequate opportunity for treaty fishing.¹⁷⁷ The court equipped itself to engage in technical oversight by approving a remedy structure involving collaboration among the state, tribal, and federal sovereigns through the framework of the Columbia River Fish Management Plan.¹⁷⁸

¹⁷⁴ *Id.* at 6-7. Judge Redden also made clear that if the NMFS failed to identify adequate hydrosystem changes in the biological opinion, a fall-back course of action was to consider the alternative of breaching four dams located on the lower Snake River. For years the tribes, along with conservation and fishing groups, have advocated breaching the dams, although the tribal river operations plan proposes non-breaching operational alternatives. *See* Nez Perce Tribe, Resolution #99-140 (Feb. 3, 1999) (on file with author) (calling for breaching four Snake River dams). Judge Redden emphasized that the 2000 biological opinion anticipated breaching the lower Snake River dams to avoid jeopardizing the species and that the NMFS had expressly stated that insufficient implementation of the RPAs in the 2000 biological opinion might necessitate breaching as a last resort option to prevent extinction of the runs. *See* National Wildlife Fed’n v. National Marine Fisheries Serv., CV 01-640-RE, Opinion and Order of Remand, slip op. at 7 (D. Or. Oct. 7, 2005).

¹⁷⁵ The 2004 and 2005 spill injunctions amount to incremental steps in “running the river” pending ESA compliance.

¹⁷⁶ *Sohappy v. Smith* (*United States v. Oregon*), 302 F. Supp. 899, 911 (D. Or. 1969). In *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 696 (1979), the Court upheld the federal district court’s authority to assume “direct supervision of the fisheries” by issuing “detailed remedial orders.”

¹⁷⁷ *See id.* At 696 n.36 (referring to treaty litigation in the district court, stating, “The [state of Washington’s] extraordinary machinations in resisting the [1974] [harvest] decree have forced the district court to take over a large share of the management of the state’s fishery in order to enforce its decrees.”) (citing Ninth Circuit opinion).

¹⁷⁸ *See supra* note 90 (describing Columbia River Fish Management Plan (CRFMP), which set forth a collaborative process, under the court’s ongoing supervision, to manage harvests). The CRFMP is widely

Now the court faces a dire biological situation because of recalcitrant federal agencies. If the court has to resort to “running the river” as to aspects of the hydrosystem, it will necessarily require the technical expertise of the state and tribal sovereigns. Judge Redden’s remand order sets in place some of the measures that would be a necessary predicate for a more active judicial role in ESA enforcement if needed to prevent extinction of the species.¹⁷⁹ The tribes are poised to participate fully in such a judicial process, as they did in the *United States v. Oregon* harvest litigation.¹⁸⁰

deemed a model arrangement for implementing a judicial decree in a manner responsive to the complexities of modern management challenges. See Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 <BI>Wis. L. Rev.<D> 375, 406-07.

¹⁷⁹ U.S. Sen. Larry Craig (R-Idaho) recently dealt a blow to the court’s ability to examine independent science by inserting an appropriations rider in a funding bill that eliminates the Fish Passage Center (FPC), an independent agency that provides analysis and data on fish passage through the Columbia River hydrosystem. See Blaine Harden, *Zeroing Out the Messenger*, <BI>Wash. Post<D>, Nov. 30, 2005, at A21. The FPC data was used widely by tribes and environmental plaintiffs in seeking injunctive relief before Judge Redden. The FPC’s fish counts showed a marked increase in fish survival as a result of the 2005 court ordered spill, a fact that Judge Redden noted in his most recent order mandating certain spill measures for the late spring of 2006. See *supra* note 143. In the same order Judge Redden expressed concern over the demise of the FPC, noting, “The Fish Passage Center’s expertise at gathering such useful data must be replicated for the spring of 2006 and beyond. Only with such data can the relative benefits of spill and transportation be determined.” *National Wildlife Fed’n v. National Marine Fisheries Serv.*, CV 01-640-RE, Opinion and Order, slip op. at 16-17 (D. Or. Dec. 29, 2005).

The *Washington Post* article did not hesitate to suggest that Senator Craig’s action was motivated by a desire to suppress the production of data that supported spill measures opposed by the hydroelectric industry. It reported that Senator Craig receives election campaign money from the utility industry and has been named “legislator of the year” by the National Hydropower Association. Harden, *supra*. A New York Times editorial denounced Senator Craig’s action, stating that “[f]or years, the Fish Passage Center has . . . supplied vital and entirely neutral information.” *Larry Craig Versus the Salmon*, The New York Times December 12, 2005 at A26. The editorial criticized Senator Craig’s action as a blatant demonstration of how “galvanized he can get on behalf of the Northwest power dam industry. . . .” *Id.*

¹⁸⁰ Indeed, in CRITFC’s initial presentation of its 2006 River Operations Plan, the tribal agency suggested establishing a planning and decisionmaking process for river operations “such as [the] *U.S. v. Oregon* [process] with federal court oversight.” See <BI>Rob Lothrop & Bob Heinith, Summary Presentation, Preliminary CRITFC 2006 River Operations Plan<D> (Sept. 29, 2005), available at http://www.salmonrecovery.gov/reports_and_papers/hydro_operations/docs/CRITFC%20ROP_06.pdf (last visited Jan. 5, 2006) cited in Treaty Tribes’ Memo in Support of Further Injunctive Relief (2006 Operations) 2, *National Wildlife Fed’n v. National Marine Fisheries Serv.*, CV 01-640-RE (Nov. 1, 2005).

C. Summary

The Columbia River situation represents a diminished trust at its most extreme. Once the largest commercial fishery in the world boasting returns of 10 to 16 million fish, the wild salmon are now nearly extinct. The NMFS, the agency Congress charged with implementation of the ESA, has been paralyzed by political controversy since the first listings of salmon over 15 years ago and has never forced necessary changes to the hydrosystem. After a decade of litigation, a federal district court has required specific interim relief for salmon in the form of spill and has ordered the NMFS to produce a biological opinion in close consultation with the sovereign co-managers of the salmon--the states and tribes. While not asserting their treaty rights in this litigation, it is clear that the tribes, through their fish management agency, will play a central role in efforts to restore a measure of the abundant trust within the framework of the ESA. With a history of recalcitrance now recognized and confronted by the court, the NMFS has left an administrative vacuum in the protection of the salmon. If the court ultimately has to impose relief measures amounting to “running the river” in order to avoid jeopardy to the species, the tribes may be essential in providing the technical expertise necessary to support an injunction until the NMFS issues a biological opinion that carries out the mandate of ESA §7.

II. The Trust Litigation in the Klamath Basin: *Pacific Coast Federation of Fishermen’s Associations v. U.S. Bureau of Reclamation*

A. Background

The Klamath Basin has been the subject of ongoing litigation against the U.S. Bureau of Reclamation (BOR) for its operation of a water storage and irrigation project serving over 200,000 acres of land in southern Oregon and northern California.¹⁸¹ The project was authorized in 1905 pursuant to the Reclamation Act of 1902.¹⁸² In accordance with state water law, the United States appropriated all available water rights in the Klamath River, the Lost River, and their tributaries in Oregon and began constructing a series of water diversion projects that completely transformed the hydrology of the basin. Under the project, the BOR determines the level, timing, and rate of water flow through the affected rivers.

The series of demands on the Klamath Basin resulting from this project are unsustainable. Irrigators depend on the water for farming livelihoods, two national wildlife refuges depend on the water for ecosystem support, and various species of fish require adequate flows in the Klamath River and minimum lake levels that directly conflict with irrigation demands.¹⁸³ Since time immemorial, the Klamath, Yurok, Karuk, and Hoopa Valley Tribes have used the fish in the Klamath Basin for subsistence,

¹⁸¹ The context surrounding this litigation is the subject of considerable commentary. *See* Reed D. Benson, *Giving Suckers (and Salmon) an Even Break: Klamath Basin Water and the Endangered Species Act*, 15 *Tul. Env't'l L.J.* 197 (2002); Holly Doremus & A. Dan Tarlock, *Fish, Farms and Clash of Cultures in the Klamath Basin*, 30 *Ecol. L.Q.* 279 (2003).

¹⁸² *See* Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 138 F. Supp. 2d 1228, 1230 (N.D. Cal. 2001).

¹⁸³ For discussion, *see* Benson, *supra* note 181.

commercial, cultural, and religious purposes.¹⁸⁴ Many of the species have also supported a non-Indian commercial fishing industry.¹⁸⁵

The Klamath Project has had a devastating effect on fisheries. In 1988 two species of fish, the Lost River and shortnose suckers, were listed as endangered under the ESA due to population decline from damming, flow diversion, and decreased water quality.¹⁸⁶ In 1997 the Southern Oregon/Northwestern California Coast coho salmon was listed as threatened under the ESA.¹⁸⁷ The coho is an anadromous fish that migrates to the ocean and returns to the rivers to spawn. Like the other imperiled native fish in the Klamath Basin, its life cycle depends on adequate water flows that are now largely controlled by the BOR.¹⁸⁸ Once the species were listed, the ESA formed a new legal overlay to water management in the Klamath Basin and triggered substantial litigation, part of which has involved tribal fishing rights.

Analysis of this litigation reveals an interesting relationship between the ESA and doctrines of Indian law. Unlike in the Columbia River Basin, tribes in the Klamath Basin have asserted claims based on the government's trust obligation to protect their fishing rights in conjunction with litigation under the ESA.¹⁸⁹

¹⁸⁴ *Pacific Coast*, 138 F. Supp. 2d at 1231; *Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, Civ. No. C 02-02006 SBA, Order, slip op. at 1 (N.D. Cal. Mar. 7, 2005).

¹⁸⁵ See *Parravano v. Babbitt*, 70 F.3d 539, 542-43 (9th Cir. 1995) (describing regulation of commercial fishing industry).

¹⁸⁶ See *Kandra v. United States*, 145 F. Supp. 2d 1192, 1196-97 (D. Or. 2001).

¹⁸⁷ See *id.* at 1197.

¹⁸⁸ See *Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1086-87 (9th Cir. 2005). Pacificorp also plays a major role in river flows through its dam operations. See *infra* note 189.

¹⁸⁹ This Article discusses a trust claim brought by the Yurok Tribe based on a massive fish kill in 2002. The Klamath Tribe also pursued litigation against Pacificorp, a private utility company that operates dams on the Klamath River. The tribe sought damages for blocking fish runs and interfering with its treaty right to take fish. The district court of Oregon recently granted Pacificorp's motion for summary judgment on the basis that the treaty did not provide a cause of action for damages against a non-party to the treaty. Klamath

B. ESA Claims in Pacific Coast Federation

The tribal trust claim is part of a broader ESA case brought by commercial fishing and environmental groups that has been ongoing for several years. In *Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation*,¹⁹⁰ plaintiff fishing and conservation organizations initially claimed that the BOR had violated the ESA by failing to consult with the NMFS concerning the impact of the Klamath Project 2000 Operations Plan.¹⁹¹ The Klamath Tribes participated as amicus parties in support of the plaintiffs' ESA claims. On April 3, 2001, federal district court Judge Sandra Brown Armstrong held that the BOR had violated the ESA and ordered injunctive relief in the form of minimum flows pending completion of consultation under §7.¹⁹² Specifically, she enjoined the BOR from sending water from the Klamath River to serve irrigation needs whenever the flows of the Klamath River dropped below minimum levels recommended in a report conducted by an independent scientist, Dr. Thomas Hardy.¹⁹³ Dr. Hardy's "Phase I Report," as the court referred to it, had been commissioned by the U.S. Department of Interior for the purpose of making recommendations for recovery of anadromous fish in the lower Klamath River.¹⁹⁴ The Phase I report was prepared in collaboration with a technical review team comprised of representatives from FWS,

Tribes v. Pacificorp, 2005 WL 1661821 at *5 (D. Or. July 13, 2005) (relying on *Skokomish Indian Tribe v. United States*, 410 F.3d 506 (9th Cir. 2005)). That lower court ruling is now on appeal to the Ninth Circuit.

¹⁹⁰ *Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 138 F. Supp. 2d 1228 (N.D. Cal. 2001).

¹⁹¹ *Id.* at 1240.

¹⁹² *Id.* at 1248-50.

¹⁹³ *Id.* at 1250.

¹⁹⁴ *Id.* at 1232.

NMFS, BOR, the Bureau of Indian Affairs, the Yurok, Hoopa and Karuk Tribes, and California's Department of Fish and Game.¹⁹⁵

Finding an injunction mandatory when faced with a substantial procedural violation of the ESA,¹⁹⁶ the judge ordered the BOR to comply with the minimum flows until the NMFS issued a comprehensive biological opinion and the BOR complied with it.¹⁹⁷ The remedy bore some similarities to the remedy awarded in the *NWF v. NMFS* litigation described above. First, it clearly imposed operational requirements on the BOR pending the remand for consultation. Second, it was crafted in response to an administrative vacuum. Since no consultation had been done on the Klamath Project 2000 Operations Plan, the judge faced a situation of “administrative limbo” that lacked any concrete recommendation by the NMFS as to what was needed to protect listed coho salmon.¹⁹⁸ The judge noted that the Hardy Phase I report was supported by science and was the product of “extensive input” from the technical team.¹⁹⁹ Third, the remedy had

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 1248-49.

¹⁹⁷ *Id.* at 1249-50. As it turned out, however, just two days after Judge Armstrong issued her opinion, on April 5, 2001, FWS issued a biological opinion concluding that the BOR 2001 operations plan would result in jeopardy for the shortnose and Lost River sucker fish. The next day, on April 6, 2001, NMFS issued a biological opinion concluding that the plan would jeopardize coho salmon. On April 6, 2001, BOR revised its operations plan to terminate delivery of irrigation water from Upper Klamath Lake to irrigation districts and farmers for the year 2001. The sequence of events is described in Doremus & Tarlock, *supra* note 181, at 318-22. The irrigators filed a Fifth Amendment takings claim against the government, which was denied by the U.S. Court of Claims in *Klamath Irrigation District v. United States*, 67 Fed. Cl. 504 (2005). That court noted that water rights held by the irrigators were “subservient to the prior interests not only of the United States, but of the various tribes . . . whose interests ‘carry a priority date of time immemorial.’” *Id.* at 539 (citing *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1984)(other citation omitted).

¹⁹⁸ *See id.* at 1246 (“In this case, the [BOR’s] ‘informal consultations’ produced no final conclusion concerning the likely impact of its 2000 Operations Plan on the coho salmon. This omission had the affect [sic] of placing the plan, and project operations, in a type of administrative limbo.”). The situation contrasts somewhat to the Columbia River Basin, where the NMFS had produced a biological opinion that was found invalid by the court. Nevertheless, both cases involved an administrative vacuum under ESA §7 resulting from the lack of a valid biological opinion on a river operations plan.

¹⁹⁹ The judge concluded that the Phase I report amounted to the “best science currently available and that it appropriately may be used as a guide for the Court’s injunction, pending the [BOR’s] . . . completion of the consultation process. . . .” and stated, “Neither the [BOR] nor Intervenor direct the Court to any better

some measure of indirect tribal involvement because the tribes had participated on the technical team that had collaborated on the Hardy report. Overall, this first phase of ESA litigation resulting from the coho ESA listings provided some measure of meaningful injunctive relief. While the tribes participated as amicus, they did not play nearly as prominent a role in this ESA case as the Columbia River tribes did in the *NWF v. NMFS* litigation described above.

On May 31, 2002, the NMFS released its biological opinion on the BOR's Klamath Project operations. The agency found jeopardy to the coho from operation of the project, but offered an RPA to avoid jeopardy. Under the RPA, the BOR would implement specific flow requirements in a phased-in approach lasting 10 years from 2002 to 2012.²⁰⁰ The BOR was not required to provide the full quantity of water that the NMFS deemed necessary for the coho until year nine; during the first eight years of implementation, the BOR would be required to provide at most 57% of the species' total water needs.²⁰¹

On June 10, 2002, after publicly announcing its operations plan, representatives of the Yurok Tribe informed the BOR of their view that the flows were insufficient to protect the tribe's fishery and requested changes in flow levels and other operating criteria.²⁰² One month later, the BOR further reduced flows to the lower Klamath River pursuant to a provision in the 2002 biological opinion that adjusted flow schedules based

science." *Id.* at 1249-50. Considerable scientific controversy has surrounded the issue of flows in the Klamath Basin. See Doremus & Tarlock, *supra* note 181, at 324-27 (describing review by National Research Council).

²⁰⁰ See *Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1088-89 (9th Cir. 2005).

²⁰¹ *Id.* at 1090-91.

²⁰² *Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, Civ. No. C 02-02006 SBA, Order, slip op. at 2 (N.D. Cal. Mar. 7, 2005).

on water-year types.²⁰³ In response, the tribe requested that the BOR rescind the decision in order to fulfill its fiduciary obligation to protect the tribal fisheries.²⁰⁴ The BOR refused.²⁰⁵ Subsequently, in September 2002, there was a major, unprecedented fish die-off in the lower reaches of the Klamath River within the Yurok Reservation. As many as 80,000 adult fish were killed before they could spawn, the majority of which were adult fall Chinook salmon that would have contributed to the tribal fishery and whose progeny would have contributed to future fisheries.²⁰⁶ The tribe blamed the fish kill on the Klamath Project, alleging that the BOR failed to provide flows adequate to support spawning salmon.²⁰⁷

In a second chapter of ESA litigation, fishing interests and environmental organizations challenged the BOR's operations under the NMFS' 2002 biological opinion.²⁰⁸ The plaintiffs challenged the 57 percent "proportional responsibility" theory of the Bureau and also alleged that the government's plan violated the ESA by employing a phased approach to water flows that failed to analyze how the first eight years of

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ The district court referred to a "conservatively" estimated mortality of 34,000 fish, *id.* at 2-3, but a report by the California Department of Fish and Game places the estimate at up to twice that number. See California Department of Fish and Game, *September 2002 Klamath Fish-Kill: Final Analysis of Contributing Factors and Impacts, Executive Summary* at III (July 2004). The magnitude of the September 2002 fish kill was unprecedented in the Basin. The Chinook salmon are not yet listed under the ESA.

²⁰⁷ *Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, Civ. No. C 02-2006 SBA, 2003 U.S. Dist. LEXIS 13745 at *28-29 (N.D. Cal. July 16, 2003), *reversed in part* *Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1086-87 (9th Cir. 2005). The California Department of Fish and Game's peer-reviewed study concluded that BOR-ordered low flows in the river at that critical spawning time was a major contributing factor in the fish kill. See *California Department of Fish and Game, supra* note 206, *Executive Summary* at III. Nevertheless, the cause of the fish kill remains controversial due to the myriad of factors potentially involved. See *Doremus & Tarlock, supra* note 181, at 335.

²⁰⁸ *Pacific Coast*, 2003 U.S. Dist. LEXIS 13745 at *28-29.

operation would avoid jeopardy to the coho.²⁰⁹ On February 4, 2003, the court granted the Hoopa Valley Tribe's and the Yurok Tribe's respective motion to intervene.²¹⁰ In addition to asserting ESA claims, the tribes also claimed that the BOR had violated its trust obligation to them in operating the Klamath Project in a manner that they alleged caused the massive fish die-off.²¹¹ In an unpublished order issued July 15, 2003, Judge Armstrong set the ESA and trust claims on two separate tracks. As to the trust claim, she found that a triable issue of fact existed as to whether the BOR breached its fiduciary obligation to the tribes; accordingly, that claim proceeded towards trial.²¹² In the same order she addressed the ESA claims, finding that the RPA offered in the 2002 biological opinion was arbitrary and capricious.²¹³ She remanded the biological opinion to the NMFS but allowed it to remain in effect to govern water flows until the NMFS issued an amended biological opinion.²¹⁴

The plaintiffs appealed Judge Armstrong's decision to uphold the NMFS' short-term flow measures. On October 18, 2005, the Ninth Circuit delivered the plaintiffs a decisive victory, finding that the NMFS' biological opinion lacked analysis of the effect of the first eight years of water flow implementation on the listed fish.²¹⁵ The court remanded the case to the district court with instructions to craft appropriate injunctive relief, stating: "We emphasize that the interim injunctive relief should reflect the short

²⁰⁹ See *Pacific Coast*, 426 F.3d at 1084.

²¹⁰ *Pacific Coast*, 2003 U.S. Dist. LEXIS 13745 at *28-29.

²¹¹ The Hoopa Valley Tribe later settled its claim against the government, leaving the Yurok Tribe as the sole tribal Intervenor. See *Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, Civ. No. C 02-02006 SBA, Order, slip op. at 1 (N.D. Cal. Mar. 7, 2005).

²¹² *Pacific Coast*, 2003 U.S. Dist. LEXIS 13745 at *68-69.

²¹³ *Id.* at *59.

²¹⁴ *Id.*

²¹⁵ *Pacific Coast*, 426 F.3d at 1090-91.

life-cycle of the species. It is not enough to provide water for the coho to survive in five years, if in the meantime, the population has been weakened or destroyed by inadequate water flows.”²¹⁶ As in the *NWF v. NMFS* litigation, when faced with a diminished trust scenario where continuation of the status quo may jeopardize the existence of the fish, the Ninth Circuit interpreted the ESA to impose a duty on courts to fashion injunctive relief in the form of in-river operational changes during the time it takes for the agencies to restructure their plans to meet ESA §7’s strict mandate.

C. The Yurok Tribe’s Trust Claim in Pacific Coast Federation

The Yurok Tribe’s trust claim in this litigation is quite separate from the ESA claims as it is premised on the federal government’s long-standing fiduciary obligation to tribes to protect their land and resources. The federal trust obligation stems primarily from common law and forms the background of every relinquishment of native property, whether accomplished by treaty, statute, or executive order.²¹⁷ It is undisputed that the

²¹⁶ *Id.* at 1095.

²¹⁷ See *United States v. White Mountain Apache Tribe*, 123 S. Ct. 1126, 1134 n.3 (2003) (recognizing general trust relationship between tribes and the United States); *Department of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 11 (2001):

The fiduciary relationship has been described as “one of the primary cornerstones of Indian law,” *F. Cohen, Handbook of Federal Indian Law* 221 (1982), and has been compared to one existing under a common law trust, with the United States as trustee, the Indian tribes or individuals as beneficiaries, and the property and natural resources managed by the United States as the trust corpus.

Id. at 11. See also *United States American Indian Policy Review Commission, Report on Trust Responsibilities and The Federal Indian Relationship* 51 (U.S. Govt. Printing Office 1976) (noting trust obligation was a “significant part of the consideration” for the native cessions of land to the United States). For discussion of the trust responsibility, see Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 *Tulsa L. Rev.* 355 (2003) [hereinafter Wood, *Injunctive Relief*]; Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, *Utah L. Rev.* 1471 (1994) [hereinafter Wood, *Trust I*].

Klamath Basin tribes have relied on fish as a central part of their subsistence and culture for millennia.²¹⁸ Courts have said innumerable times that in carrying out their statutory duties, federal agencies must protect the interests of tribes.²¹⁹ Several courts have emphasized that the trust obligation imposes a fiduciary duty on the federal agencies to protect Indian fishing rights in the Klamath Basin.²²⁰ In 2001, the Supreme Court declared definitively in the context of an informational request concerning tribal water rights in the Klamath Basin:

The fiduciary relationship has been described as “one of the primary cornerstones of Indian law,” and has been compared to one existing under a common law trust, with the United States as trustee, the Indian tribes or individuals as beneficiaries, and the property and natural resources managed by the United States as the trust corpus.²²¹

²¹⁸ See *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995) (noting also Congress’ concern about protecting tribal fisheries in the Hoopa-Yurok Settlement Act); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983). The pervasive tribal reliance on salmon throughout the Pacific Northwest has formed an important backdrop to treaty interpretation. See *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 667-68 (1979).

²¹⁹ See *Wood*, *Injunctive Relief*, *supra* note 217, at 360, n.36 and accompanying text (citing cases).

²²⁰ *Parravano*, 70 F.3d at 547 (“[T]he Tribes’ federally reserved fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights.”); *Klamath Water Users Protective Ass’n v. Patterson*, 204 F.3d 1206, 1213-14 (9th Cir. 2000) (“Similar to its duties under the ESA, the United States, as a trustee for the Tribes, has a responsibility to protect their rights and resources . . . [and the Bureau of Reclamation] has a responsibility to divert the water and resources needed to fulfill the Tribes’ rights, rights that take precedence over any alleged rights of the Irrigators.”); *Kandra v. Klamath Irrigation District*, 145 F. Supp. 2d 1192, 1197 (D. Or. 2001) (“Reclamation has an obligation to protect tribal trust resources such as the sucker fish and salmon.”); *Pacific Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1086 (9th Cir. 2005) (“Several tribes in the area have treaty rights to Klamath River fish, and the Department of Interior must meet the United States’ fiduciary duty to maintain these resources.”); *Pacific Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, Civ. No. C 02-2006 SBA, 2003 U.S. Dist. LEXIS 13745 at *62-63 (N. D. Cal. July 16, 2003) (“It is undisputed that a fiduciary relationship exists between the Tribes and the BOR. . . . As the Tribes’ fiduciary, the United States ‘is held to strict standards and is required to exercise the greatest care in administering its trust obligations.’”) (citation omitted).

²²¹ *Department of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 11 (2001)(citation omitted).

The trust doctrine is an important overlay to the ESA in the river context for three reasons. First, while the agencies may resist ESA implementation--clearly the case in both the Columbia and the Klamath basins--the trust responsibility provides a source of duty separate from the ESA. Second, even if the ESA is implemented, it may be interpreted so as to provide protection for simply remnant levels of species rather than fully harvestable levels. The ESA has a recovery mandate, but so far no court has delved deeply into the question of how much recovery the ESA requires. The trust responsibility seemingly requires recovery to the extent necessary to protect fishing rights, likely a much higher standard than under the ESA. And finally, the ESA protects only listed species of fish. Tribes may rely on other species that are not yet listed but nevertheless need protection. In the Klamath, for example, the bulk of fish killed in 2002 were adult fall Chinook,²²² a species not yet listed under the ESA. Because different species may have different life-cycle requirements, ESA protection for one species may not protect non-listed trust species.

The Yurok Tribe framed its trust claim by alleging that the BOR “fail[ed] to provide biologically adequate flows in 2002 and [operated] the Klamath Irrigation Project in a manner that contributed to the deaths of over 23,000 adult Chinook and threatened coho salmon.”²²³ The claim was premised on the waiver of sovereign immunity provided through the APA.²²⁴ For relief, the tribe requested a declaration that “the BOR’s operation of the Klamath Project violated the Tribe’s fishing right,” and an injunction

²²² Pacific Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation, Civ. No. C 02-02006 SBA, Order, slip op. at 2-3 (N.D. Cal. Mar. 7, 2005).

²²³ *Id.* at 3. The tribe relied on original counts, which the California Department of Fish and Game later stated may have been significantly underestimated. *See supra* note 206.

²²⁴ *Id.* at 10.

“ordering BOR to implement an interim flow regime in the Klamath River . . . that will protect anadromous fish pending BOR’s full compliance with its obligations under the ESA, and with its duty to protect the Yurok fishing and water rights.”²²⁵ On March 7, 2005, the court dismissed the tribal trust claim in an unpublished order.²²⁶ That decision is now on appeal before the Ninth Circuit and implicates important aspects of federal Indian trust law pertaining to Indian fishing rights.

1. Procedural Grounds for Dismissal

Although plainly acknowledging the BOR’s trust duty to protect the tribe’s fishing interests,²²⁷ the court dismissed the trust claims seemingly on four different grounds, three of which were procedural and one of which involved a substantive interpretation of the government’s fiduciary duty toward the tribe. The most definitive procedural ground was the court’s conclusion that the action was moot since it challenged a fish die-off that had previously occurred. The court found that the tribe could not show a “real and immediate” threat of reoccurring harm, stating that the BOR had taken measures to prevent another die-off.²²⁸

As a second procedural ground for dismissal, the court found that the tribe had failed to challenge “final” agency action under the APA. The tribe had fashioned its

²²⁵ *Id.* at 4.

²²⁶ *Id.*

²²⁷ *Id.* at 17 (“[T]he United States is a trustee for the Tribe, including its fishing rights, and has an obligation to protect those rights.”)(citing *Klamath Water Users Protective Ass’n*, 204 F.3d 1213); *see also* *Pacific Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, Civ. No. C 02-2006 SBA, 2003 U.S. Dist. LEXIS 13745 at *62-63 (N.D. Cal. July 16, 2003) (discussing the “undisputed” fiduciary relationship between the tribes and the BOR).

²²⁸ *Pacific Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, Civ. No. C 02-02006 SBA, Order, slip op. at 7 (N.D. Cal. Mar. 7, 2005).

claim under APA §706(2), which states that reviewing courts shall “hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²²⁹ Stating that the tribe’s claim “targets BOR’s operation of the Klamath Project, rather than a discrete agency action within the meaning of the APA,” the court found the challenge procedurally barred by §704 of the APA, which allows judicial review of “final agency action.”²³⁰ The conclusion is perplexing, since the attorney for the tribe clarified at oral argument that the tribe was challenging the Klamath Project 2002 Annual Operations Plan and the subsequent modification of that plan by the BOR on July 10, 2002, whereby the agency reduced flows in the river.²³¹ The court failed to discuss why such actions did not amount to “final” agency action-- particularly since they were implemented--and summarily found the claim jurisdictionally defective.²³²

A third procedural ground for dismissal involved the relief sought by the tribe,²³³ an area that had considerable overlap with the mootness ground. The tribe sought a declaration that the BOR’s operation of the Klamath Project violated the tribe’s fishing

²²⁹ 5 U.S.C. §706(2)(A); *Pacific Coast*, slip op. at 11. There was confusion as to whether the tribe premised its claim on APA §706(2) or §706(1), which provides a court with authority to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. §706(1). The complaint did not specify which provision provided the basis for judicial review. During summary judgment briefing, the tribe clarified that its claim was based on §706(1), but in its Opposition to the Motions to Dismiss, the tribe switched positions and argued that its claim was premised on §706(2). The court accepted the change in position and analyzed the claim under the language of §706(2) rather than §706(1). *Pacific Coast*, *supra*, slip op. at 11.

²³⁰ *Id.* at 12.

²³¹ *Pacific Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, Civ. No. C 02-02006 SBA, transcript at 0088.15 to 0089.12 (N.D. Cal.) (on file with author) [hereinafter *Pacific Coast Transcript*].

²³² *Pacific Coast*, Order, slip op. at 12-13. The transcript reveals that the court was dismissive of the actions because they were not specifically pled in the paragraphs setting forth the Fourth Claim for Relief, although the actions were described in an earlier part of the complaint, and the BOR’s written statements of the actions were attached to the complaint as Exhibits A and B to the Williams Declaration in Support of the Tribe’s Opposition to the Motions to Dismiss. See *Pacific Coast Transcript*, *supra* note 231 at 0088.8-0093.23.

²³³ *Pacific Coast*, Order, slip op. at 13.

right and an injunction ordering the BOR to implement a flow regime that is protective of the Yurok fishing rights; it stopped short of requesting any specified levels of flow because water needs may fluctuate according to various circumstances.²³⁴ In order to achieve protective flows in the future, the tribe asked the court to order the BOR to engage in a process of periodic consultation with the tribe as part of setting its flow objectives. The requested process would involve preparation of Tribal Trust Impact Statements by the BOR and a long-term plan by the BOR to ensure “lawful consideration of Klamath Project impacts on tribal trust species.”²³⁵ The court refused to grant the requested relief, stating that an injunction compelling the BOR to follow these additional procedures fell “outside the jurisdiction of the court,”²³⁶ because an appropriate remedy for an APA case is a simple remand to the agency.²³⁷ And since the flow decision concerned the 2002 water year, the court assumed a simple remand as allowed by the APA would be ineffective because of mootness.²³⁸ The court acknowledged an exception to the standard rule of judicial restraint that would allow the court to impose additional remand processes on the agency in the event of “rare circumstances,” but the court failed to find such circumstances in this case despite the massive fish die-off that the tribe

²³⁴ See *id.* at 4-5, noting, “The Tribe does not . . . indicate the manner in which it would have BOR comply with the Tribe’s fishing rights other than to maintain flow conditions in the Klamath River at unspecified levels, which, in the Tribe’s opinion, are needed to protect its fishery.” Counsel for the tribe explained that such specificity in an injunction is impractical because flow levels “need to be determined on an almost daily, weekly, monthly basis depending on the amount of water in the basin, the amount of water that is available in the river, and legal priorities.” *Pacific Coast* Transcript, *supra* note 231, at 0063.20 to 0064.6.

²³⁵ See *Pacific Coast*, Order, slip op. at 5 n.5.

²³⁶ *Id.* at 13.

²³⁷ *Id.* at 13-14 (“[A] court may not inject itself into the agency’s decision-making process by imposing additional procedural--much less, substantive--requirements on agencies beyond those mandated by statute.”).

²³⁸ *Id.* at 14; see also *Pacific Coast* Transcript, *supra* note 231, at 0097-25 to 0100-12 (discussion regarding relief and mootness issue).

alleged had resulted from the BOR's actions.²³⁹ It is unclear how, without additional processes such as those requested by the tribe, a reluctant agency would be forced to incorporate trust interests into its ESA decisionmaking.

2. Substantive Ruling on the Tribal Trust Claim

Judge Armstrong's dismissal of the tribe's trust claim could have been premised on just the three procedural grounds discussed above that the court appeared to consider determinative. But instead, the court embarked on a fourth ground for dismissal that involved a substantive interpretation of Indian trust law. Dicta or not, the court's interpretation is unfortunate because it further muddles an already confused and problematic area of Indian law. A pending appeal of Judge Armstrong's order presents an opportunity for the Ninth Circuit to provide sorely needed clarification in this area.

Judge Armstrong found the tribe's trust claim infirm because it was premised on a common-law set of substantive rights and obligations rather than any source of "positive law," such as a statute.²⁴⁰ While acknowledging that the tribe has a federally protected fishing right and that the federal government has a responsibility to protect that right,²⁴¹ the court held that the BOR had no specifically enforceable fiduciary obligations toward

²³⁹See *Pacific Coast*, Order, slip op. at 14. The court's denial of the remedy stands somewhat in contrast to the *National Wildlife Federation* decision, where Judge Redden found that the history of the NMFS' failure to comply with the ESA constituted "substantial justification" to warrant further processes on remand, including ones to ensure tribal involvement. See *National Wildlife Fed'n v. National Marine Fisheries Serv.*, CV 01-640-RE, Opinion and Order of Remand, slip op. at 9 (D. Or. Oct. 7, 2005). The *National Wildlife Federation* decision, however, was rendered within the context of the ESA and against a backdrop of agency recalcitrance and delay.

²⁴⁰ *Pacific Coast*, Order, slip op. at 14-15.

²⁴¹ *Id.* at 3, 17.

the tribe absent “a statute or other source of positive law defining the federal government’s obligations.”²⁴² The court held that any trust claim brought under the APA must identify “positive law imposing specific fiduciary duties in BOR” and that, “[i]n the absence of such a specific duty, the government’s general trust responsibilities to the Tribe are discharged by compliance with generally applicable regulations and statutes.”²⁴³

The problem with this approach is that the positive law requirement amounts to a phantom directive. Since general statutes such as the ESA were passed with the interests of the majority, not tribes, in mind, they lack any “positive law” expressing a fiduciary obligation towards tribes. The court’s insistence on a requirement that cannot be met by tribes seemingly discounts the importance of the trust responsibility and its enforceability. For two centuries of Indian law, the purpose of the trust doctrine has been to protect the land and resources of tribes against the overwhelming forces of the majority.²⁴⁴ In exchange for giving up the bulk of their lands, tribes were promised by the federal government that they would be able to continue their lifeways on smaller reservations.²⁴⁵ Today, the federal government itself--the tribes’ trustee--undertakes

²⁴² *Id.* at 15.

²⁴³ *Id.* at 17. The court also applied this rule in its July 16, 2003, decision to find that a violation of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §1855 (b)(4)(B), was not sufficient to establish a breach of fiduciary duty to the tribes. *See Pacific Coast Fed’n of Fishermen’s Associations v. U.S. Bureau of Reclamation*, Civ. No. C 02-2006 SBA, 2003 U.S. Dist. LEXIS 13745 at *62-63 (N.D. Cal. July 16, 2003).

²⁴⁴ *See Wood, Trust I, supra* note 217, at 1495-1505.

²⁴⁵ *See United States v. Adair*, 723 F.2d 1394, 1049 (9th Cir. 1983) (“In view of the historical importance of hunting and fishing, and the language of [the] Treaty, we find that one of the ‘very purposes’ of establishing the Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle. This was at the forefront of the Tribe’s concerns in negotiating the treaty and was recognized as important by the United States as well.”); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979):

“At the treaty council the United States negotiators promised, and the Indians understood, that the Yakimas would *forever be able to continue the same off-reservation food gathering and*

actions that wholly destroy the water, land, and wildlife resources that are essential to maintaining a traditional tribal livelihood. In just a century and a half, the executive and legislative branches have so diminished the abundant natural trust that in basins like the Columbia, Puget Sound, and Klamath, the salmon that supported tribes for millennia are on the verge of eradication. The only meaningful recourse tribes have to protect their trust resources is to seek relief in the courts. Further, the APA provides the only mechanism whereby a tribe can bring a trust claim for injunctive relief against a federal agency that is destroying its trust resources.²⁴⁶ The new “positive law” requirement injected into this context essentially removes any judicial protection of trust interests. Broad statements by the courts recognizing the trust responsibility lose all meaning when tribes face an insurmountable judicial hurdle to enforcing that duty.

The court’s requirement of positive law perpetuates a growing line of precedent in the Ninth Circuit and D.C. Circuit that confuses the APA context with another context in which tribes assert trust claims--that arising under the Tucker Act, which waives federal sovereign immunity for suits seeking monetary damages against the government.²⁴⁷ It has long been settled in the Tucker Act context that a trust claim must have a basis in positive law.²⁴⁸ That requirement is not at all surprising because the Tucker Act plainly states that

fishing practices as to time, place, method, species and extent as they had or were exercising. The Yakimas relied on these promises and they formed a material and basic part of the treaty and of the Indians' understanding of the meaning of the treaty.”

Id. at 667-68 (citing district court) (emphasis added).

²⁴⁶ The APA is the only statute that waives sovereign immunity for general claims seeking non-monetary relief against government agencies. *See* Pacific Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation, Civ. No. C 02-02006 SBA, Order, slip op. at 15 (N.D. Cal. Mar. 7, 2005); San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 882 (D. Ariz. 2003).

²⁴⁷ For discussion, *see* Wood, *Injunctive Relief*, *supra* note 217, at 364-368.

²⁴⁸ *See* United States v. Mitchell (*Mitchell I*); 445 U.S. 535 (1980); United States v. Mitchell (*Mitchell II*), 463 U.S. 206 (1983); United States v. White Mountain Apache Tribe, 123 S. Ct. 1126 (2003); United States v. Navajo Nation, 123 S.Ct. 1079 (2003).

a non-constitutional claim must be premised on a statute, treaty, or executive order.²⁴⁹ On four occasions the Supreme Court has applied the positive law requirement in the context of monetary claims under the Tucker Act.²⁵⁰ The APA, however, provides an altogether different statutory context for a trust claim. It contains no such limiting language and authorizes courts to overturn agency action that is “not in accordance with law.”²⁵¹ For several years, a line of cases had interpreted the trust obligation as a meaningful source of law to apply to cases seeking injunctive relief within the context of the APA.²⁵² Where agency action damages a tribe’s trust interests, the action is arguably “not in accordance with law” within the meaning of the APA because it violates the government’s fiduciary obligation toward the tribe.

Unfortunately, the distinction between the APA and the Tucker Act contexts has, over the last few years of precedent, been wholly lost on both the Ninth Circuit and the D.C. Circuit. Beginning with a case brought in the 1980s, courts began to import the express limitations of the Tucker Act into cases brought under the APA, without ever considering the differences between the two statutes. The process began in *North Slope v. Borough* where the Inupiat Indians of Alaska challenged the government’s approval of offshore drilling that could effect bowhead whale populations that they relied upon for subsistence.²⁵³ The Inupiat brought two separate claims, one statutory claim under the ESA and one trust claim under the APA. The court rejected the trust claim, citing the

²⁴⁹ 28 U.S.C. §1505.

²⁵⁰ *See supra* note 248.

²⁵¹ 5 U.S.C. §706(2)(a).

²⁵² *See* cases discussed in Wood, *Injunctive Relief*, *supra* note 217, at 362-63, 365.

²⁵³ *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980).

Supreme Court's decision in *United States v. Mitchell*²⁵⁴ that had been decided under the Tucker Act. Not finding any specific statutory fiduciary duty to the Inupiat, the court found that mere compliance with the ESA sufficed for meeting the trust obligation.²⁵⁵ Of course such a conclusion suggests that there is no real trust obligation owed to tribes, as the ESA standards for survival do not expressly protect populations necessary to satisfy native harvest needs. Nevertheless, the opinion took hold and was then cited in case after case in the Ninth Circuit and more recently in the D.C. Circuit, with absolutely no discussion as to the propriety of applying a requirement that has its genesis in the Tucker Act to an entirely different statute, the APA.²⁵⁶

²⁵⁴ See *Mitchell I*, 445 U.S. 535.

²⁵⁵ See *North Slope*, 642 F.2d at 611-12 (quoting district court):

“[A] trust responsibility can only arise from a statute, treaty, or executive order;” in this respect we are governed by the recent Supreme Court decision in *United States v. Mitchell* holding that the United States bore no fiduciary responsibility to Native Americans under a statute which contained no specific provision in the terms of the statute.

We have no specific provision for a federal trust responsibility in any of the statutes argued to us . . .

By confining the extension of “trust responsibility,” however defined and whatever the source, to the area of overlap with the environmental statutes, the district court was arguably consistent with the Supreme Court's rationale in *United States v. Mitchell*. Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only.

²⁵⁶ See *Morongo Band of Mission Indians v. Federal Aviation Admin.*, 161 F.3d 569, 574 (9th Cir. 1998) (“[U]nless there is a specific duty that has been placed on the government with respect to Indians, this [trust] responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.”); *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 895 (D. Ariz. 2003); *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 479 (9th Cir. 2000); *Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, Civ. No. C 02-2006 SBA, 2003 U.S. Dist. LEXIS 13745 at *63 (N.D. Cal. July 16, 2003); *Pit River Tribe v. Bureau of Land Management*, 306 F. Supp. 2d 929 (E.D. Cal. 2004); *Gros Ventre Tribe v. United States*, 344 F. Supp. 2d 1221, 1226-27 (D. Mont. 2004); *Cobell v. Norton*, 392 F.3d 461, 470-471 (D.C. Cir. 2004); *Cobell v. Norton*, 240 F.3d 1081, 1098-99 (2001). This line of precedent is criticized in Wood, *Injunctive Relief*, *supra* note 217, at 365-68. In its July 16, 2003, opinion, the district court in *Pacific Coast* acknowledged that the Supreme Court precedent supporting the positive law requirement arose out of the Tucker Act context. Nevertheless, without exploring the textual differences between the Tucker Act and the APA, the court summarily concluded that “the reasoning of *Navajo Nation* extends to any breach of trust claim by an Indian tribe premised upon the Government's noncompliance with a federal statute.” *Pacific Coast*, 2003 U.S. Dist. LEXIS 13745 at *63.

The standard rule now in the D.C. and Ninth Circuits, therefore, seems to be that an APA trust claim must find a basis in a statute--which, as previously explained, is a dead-end for nearly all trust claims arising in the environmental context because environmental statutes lack such language. Under this line of precedent, tribes are relegated to the position of any citizen group bringing an environmental case, with no meaningful relief for damage to their unique expectations, economy, property rights, or way of life.²⁵⁷ The solidification of the “positive law” requirement into the context of APA claims provides a long leash to federal agencies because it means, essentially, that they can violate tribal property rights with impunity--even to the point of eradicating fishing cultures that have survived for thousands of years--as long as they comply with their general statutes, which afford them tremendous discretion.

The appeal of *Pacific Coast Federation of Fishermen’s Associations v. U.S. Bureau of Reclamation* before the Ninth Circuit presents perhaps the most compelling opportunity to steer this body of law on a course that affords some measure of justice to tribes that are suffering from the federal government’s destruction of the natural capital on which they still depend. Assuming the appellate court addresses the substantive trust claim, there is a logical direction in which to steer the case law while reconciling some of the precedent that exists. The court could craft a property interest exception to the ill-considered positive law requirement and clarify that, where a tribal property interest is at stake in the government’s action, the government must protect that property interest in carrying out its obligations under general statutes. As interpreted in this fashion, the trust

²⁵⁷ As noted in Part III, however, tribes may still claim an environmental duty of protection directly under their treaties, as the Puget Sound tribes are claiming in litigation explored *infra*. The viability of such a claim remains to be seen.

obligation would incorporate shades of nuisance and trespass theory. This clarification would underscore the property nature of the trust obligation itself, which, most fundamentally, is a duty of protection that arose from the cessions of land made long ago by tribes.²⁵⁸ It would draw on a body of common law created by courts to protect Indian property rights.²⁵⁹ By redirecting the focus of the trust obligation toward the property interests of tribes, the court would distinguish those cases where federal action harms protectible tribal property interests from those involving impacts to more generalized tribal interests, such as economic or cultural interests, that may give rise to a different set of considerations. Several older cases invoked the trust doctrine to protect the property interests of tribes.²⁶⁰ Distinguishing the property context from the more generalized context would narrow somewhat the rule now indiscriminately applied that removes any special trust obligation when the federal government acts pursuant to its vast discretion under general statutes.²⁶¹

²⁵⁸ See *supra* note 217.

²⁵⁹ See *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 687 n.27 (1979) (applying common law to support interpretation of treaty allowing tribes up to 50% of the harvestable fish); see also *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 235-36 (1985) (upholding Oneida's action for violation of their possessory rights based on federal common law and noting that "the Indians' right of occupancy need not be based on treaty, statute, or other formal Government action.").

²⁶⁰ See *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D. D.C. 1973) (Secretary of Interior obligated to send Truckee River water to Pyramid Lake to support tribal fishery); *Northern Cheyenne Tribe v. Hodel*, No. CV 82-116-BLG, 12 Indian L. Rpt. 3065 (D. Mont. 1985) (rejecting the BLM's proposal to lease federal lands for coal development just outside the Northern Cheyenne reservation); *Klamath Tribes v. United States*, No. 96-381-HA, 1996 WL 924509 (D. Or. 1996) (enjoining timber sales on U.S. Forest Service lands that supported treaty deer herds); *Northwest Sea Farms v. U.S. Army Corps of Engineers*, 931 F. Supp. 1515 (W. D. Wash. 1996) (upholding the Corps' refusal of a permit for a fish farm because it could interfere with treaty fisheries); *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995) (upholding regulation under Magnuson Act to protect tribal fisheries). These cases are discussed in Wood, *Injunctive Relief*, *supra* note 217, at 362-63.

²⁶¹ Even this distinction is not optimal for tribes that have strong cultural interests in aboriginal territory now in federal ownership. Such continuing cultural interests may be integral to the tribal religion and lifeways. Redirecting the trust doctrine along western-imposed property boundaries may thus promote harmful artificial distinctions. Nevertheless, at this point in the doctrinal evolution of the trust responsibility, such a redirection would amount to expansion of federal protection for tribal interests.

One district court has, in dicta, taken the first step in doctrinal redirection by clearly pointing to property interests as a basis for supporting a trust claim under the APA. In *Pit River Tribe v. Bureau of Land Management*,²⁶² the court rejected a tribe's trust claim under the APA seeking protection of a sacred site located on federal lands. The court was careful to note, however, that its holding turned on the federal ownership of the land in question. It stated that, in such circumstances, federal government compliance with general statutes fulfills the trust obligation to the tribe.²⁶³ The court suggested that where there are impacts to tribal trust land, the trust obligation would not be automatically satisfied by compliance with federal statutes:

The federal government does owe a high fiduciary duty to a tribe when its actions involve tribal property or treaty rights. *See, e.g., Pyramid Lake Paiute Tribe v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990) (holding the federal government has a fiduciary duty to preserve and protect the Pyramid Lake fishery which is located on the reservation). . . . *Because this case does not involve tribal property*, the federal agencies' duty to the Tribe is to follow all applicable statutes.²⁶⁴

²⁶² 306 F. Supp. 2d 929 (E.D. Cal. 2004).

²⁶³ *See id.* at 950, stating:

That the land [subject to geothermal development] is spiritually important to the Tribe . . . does not change the federal government's ownership of the land. . . . Although there may be a general fiduciary duty of the federal government owed to Indians, "unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998).

²⁶⁴ *Pit River Tribe*, 306 F. Supp. 2d at 950 (emphasis added). In its brief discussion, the district court brought some of the precedent into line with its property-based distinction. Referring to *Northern Cheyenne Tribe v. Hodel*, 804 F. Supp. 1281 (D. Mont. 1991), and *Pyramid Lake Paiute Tribe v. U.S. Department of the Navy*, 898 F.2d 1410, 1420, n.16 (9th Cir. 1990), the court noted: "The key fact in these cases is that the impacts occur on the reservation, which the federal government has a special duty to protect." *Pit River*, 306 F. Supp. 2d at 950. The court added that the project subject to its review "does not directly affect life on the Pit River reservation." *Id.*

Interestingly, however, the court viewed *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569 (9th Cir. 1998), as not involving property interests. There, the Morongo Band brought a claim under the APA against the Federal Aviation Administration for situating a flight path into Los Angeles airport directly over canyons on the reservation where tribal members conducted traditional ceremonies. The Ninth Circuit denied the trust claim. *Id.* at 574. *See supra* note 263 (citing *Morongo*

In *Pacific Coast Federation*, Judge Armstrong hinted at a property exception to the positive law requirement, noting in passing that where a property interest was at stake, the trust obligation may support a claim under the APA: “[W]hen seeking to enforce a trust relationship against the federal government, plaintiffs must identify a trust duty deriving from positive law, such as a statutory right or prohibition, *or a property interest cognizable under the Fifth Amendment* that has been impacted.”²⁶⁵ But curiously, the opinion lacks any analysis of a property rights exception, or particularly how the Yurok fishing interests might or might not fit such an exception, leaving a stark ambiguity as to whether the exception simply did not exist in the court’s mind, or the fishing rights for some reason failed to rise to the level of property interests.²⁶⁶

Band). The *Pit River* court ignored the fact that *Morongo Band* involved on-reservation impacts, seemingly discounting such interests because they were cultural in nature and perhaps, in the court’s mind, not full-blown property interests. See discussion in *Pit River*, 306 F. Supp. 2d at 950.

One other recent case seemingly disagrees with the *Pit River* property-based distinction. In *Gros Ventre Tribe v. United States*, 344 F. Supp. 2d 1221 (D. Mont. 2004), the Gros Ventre Tribe challenged the BLM’s past mining actions off the reservation, claiming that the mining harmed the reservation in violation of the government’s fiduciary duty toward the tribe. The court rejected the claim primarily on procedural grounds involving mootness and statutes of limitations, but also took the opportunity to reject even a property-based trust argument: “Here, the BLM’s control has been exercised over non-tribal land. Even if the Court assumes the truth of Plaintiffs’ allegation that those non-reservation activities have affected tribal property, the trust obligation is not elevated to an independent source of law.” *Id.* at 1227. The importance of this statement is difficult to evaluate in the context of the court’s overall discussion, which focuses primarily on procedural rules under the APA.

²⁶⁵ *Pacific Coast Fed’n of Fishermen’s Ass’ns v. U.S. Bureau of Reclamation*, Civ. No. C 02-02006 SBA, Order, slip op. at 16 (N.D. Cal. Mar. 7, 2005) (emphasis added).

²⁶⁶ It would have been possible for the district court to expressly acknowledge the fishing rights as protectible property interests under the trust responsibility but also to have concluded that, because the claimed damage had already occurred, there was no protection the court could offer at that point. Such a finding would have held precedential value to the Klamath Basin tribes in the event they encounter an imminent threat of fish kill from the federal government’s operation of the river in the future.

Curiously, the federal government acknowledged a property exception to the positive law requirement. However, it seemed to suggest that the tribe’s fishing rights were not fully enforceable property rights, apparently because requisite flows to support such rights had not been quantified. The government’s brief argued:

[T]he Tribe’s federal reserved fishing rights . . . have never been adjudicated as to the quantities of flow that may be necessary “to support a productive and viable anadromous fishery.” Thus, the Yurok Tribe has failed to identify a substantive legal duty to operate the Klamath Project to

Unfortunately, lack of precise doctrinal analysis is a common denominator in the body of opinions dealing with the trust responsibility.

It seems clear that if courts ultimately decide that the trust doctrine should protect property rights within the structure of the APA, then the Yurok Tribe's fishing rights clearly warrant protection. Courts have repeatedly noted that tribal fishing rights are property rights.²⁶⁷ It is widely understood that extinguishment of such rights gives rise to a compensation requirement under the Fifth Amendment of the U.S. Constitution.²⁶⁸ Moreover, numerous courts in the Ninth Circuit have indicated that fishing rights are protected under the trust responsibility.²⁶⁹ In the closely related context of water, the Ninth Circuit has specifically recognized a property right in the form of an instream water right to protect tribal fisheries in the Klamath Basin.²⁷⁰

D. Summary

maintain flow conditions on the Klamath River at particular levels In the absence of any such legal duty or *precise* property interest, this Court could not, under . . . the APA, grant the injunctive relief sought by the Tribe.

Memorandum of Points and Authorities in Support of Motion to Dismiss Yurok Tribe's Fourth Claim for Relief 20, Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, C 02-02006 (N.D. Cal.) (on file with author) (emphasis added)(citing tribe's complaint). The government's position seems circular. The Ninth Circuit has recognized a tribal right to water in the Klamath Basin to support fish and wildlife. *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983). The fact that the flows needed to support fisheries remain unquantified in no way indicates a deficiency in the fishing property right itself. The whole purpose of the tribe's claim is to seek a flow remedy that will provide a mechanism for quantifying and securing the water necessary to protect its property right to harvest fish. *See supra* notes 234-35 and accompanying text.

²⁶⁷ *See supra* note 27. While the Yurok and Hoopa Valley Tribes' fishing rights derive from an executive order rather than treaty, the Ninth Circuit squarely eliminated any distinction between the two sources. *See Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995). *See supra* note 25.

²⁶⁸ *See supra* note 27.

²⁶⁹ *See supra* note 220 (Klamath Basin); *Northwest Sea Farms v. U.S. Army Corps of Engineers*, 931 F. Supp. 1515 (W.D. Wash. 1996); *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D. D.C. 1973).

²⁷⁰ *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983).

The poignant circumstances giving rise to the Yurok's trust claim in the *Pacific Coast Federation* case represent a straightforward demonstration of trust principles. Once supporting an abundant natural trust, the Klamath River system has been radically altered by a federally operated reclamation project that depletes the river of the water necessary to sustain aquatic life. A tribal fishing culture that has flourished for millennia is imperiled because the fisheries are so depleted. When the BOR decided to decrease flows in a drought year, the tribe feared adverse effects on its harvest interests and protested the action as a violation of the trust responsibility. Scores of cases emphasize the BOR's fiduciary duty toward the tribes as trustee of tribal fish and water resources. The only issue is whether tribes will be able to enforce that responsibility in the courts; if they cannot, the responsibility amounts to nothing. In *Pacific Coast Federation*, the court analyzed the trust claim in a standard administrative law posture and seemingly disregarded the vital role of the trust responsibility in protecting tribal property rights to continue a fishing livelihood. If the government's depletion of water in the river did indeed cause the massive fish kill of 2002--and the question is open, since the tribes never had a chance to prove it did--such action clearly impaired the tribes' property rights to harvest fish that year and seemingly violated the government's longstanding fiduciary obligation towards the tribes. Whether there is any remedy for such action will depend largely on the appeal now before the Ninth Circuit.

III. The Treaty Litigation in the Puget Sound Region: *United States v. Washington*

Much like the tribes in the Columbia and Klamath Basins, Puget Sound tribes have suffered tremendous fishing losses from plummeting fish populations as a result of habitat degradation and hydrosystem operations. The decline in fish happened precipitously over the last 30 years as the region's population soared.²⁷¹ In the mid-1980s, the tribal catch was approximately 5 million fish.²⁷² Today it is about 500,000 fish, representing a 90% decline in harvest in just 20 years.²⁷³ Puget Sound tribes have firm treaty rights to harvest fish as a result of a fishing clause found in the Stevens treaties. In the landmark case *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, the Supreme Court held that the treaty language that “secured” the “right of taking fish, at all usual and accustomed grounds and stations, in common with all citizens of the Territory” supported a tribal right to take up to 50% of the harvestable quantity of fish.²⁷⁴ To ensure implementation of a fair treaty harvest, the district court of Washington maintained jurisdiction over the case.²⁷⁵ Under the court's jurisdiction, the tribes became recognized co-managers of the salmon resource, much like their tribal counterparts in the Columbia River Basin.

Also similar to the Columbia River and Klamath context, ESA regulation was a latecomer to the broader Puget Sound region, occurring long after judicial interpretation of the treaty harvest rights. In 1999, Puget Sound chinook, Hood Canal/Strait of Juan de Fuca summer chum, and Lake Ozette sockeye salmon were listed as “threatened” under

²⁷¹ See Northwest Indian Fisheries Commission, *Pacific Coastal Salmon Recovery Program*, at <http://www.nwifc.wa.gov/recovery/index.asp> (last visited Dec. 27, 2005).

²⁷² Engelson, *supra* note 22.

²⁷³ *Id.*

²⁷⁴ *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 686-87 (1979). The court imposed a cap of that amount necessary to fulfill the tribes' moderate living needs.

²⁷⁵ See *United States v. Washington (Phase II)*, 506 F. Supp. 187, 191 (W.D. Wash. 1980).

the ESA.²⁷⁶ As in both the Columbia and Klamath contexts, the ESA is inadequate to protect tribal fishing rights because it fails to protect all species subject to tribal harvest,²⁷⁷ and the protection it does offer is directed toward delisting the species at survival levels rather than harvestable levels.²⁷⁸ In the face of declining fisheries and the inadequacy of ESA regulation, the Puget Sound tribes have turned to their treaty rights to allege a right of environmental protection within the context of the ongoing *United States v. Washington* litigation. The claim differs from pending litigation in both the Columbia River and Klamath contexts in that the Puget Sound claim is a pure treaty-based claim, as distinguished from the ESA statutory claim in the Columbia River litigation and the trust claim in the Klamath litigation.²⁷⁹ Moreover, the Puget Sound tribes are pursuing their claim against the state of Washington rather than the federal government.

A. *United States v. Washington: The Orrick Decision*

The treaty claim to environmental protection was first asserted 25 years ago as a second phase of the *United States v. Washington* litigation brought by the United States on behalf of tribes against the state of Washington to gain a fair share of harvest.²⁸⁰ At that time, the United States sought a broad declaration that the state had a duty to protect treaty

²⁷⁶ Final Listing Rule, 64 Fed. Reg. 41835 (Aug. 2, 1999).

²⁷⁷ The statute only covers listed species. The chum salmon, for example, is a “bread and butter catch” for tribal fishermen yet is unprotected by the ESA. *See* Engelson, *supra* note 22.

²⁷⁸ One can argue, however, that the Act should be interpreted to protect harvestable levels of fish. *See supra* notes 112-16 and accompanying text.

²⁷⁹ Though both trust and treaty claims are grounded in property law concepts, the former incorporates the more generalized duty of protection applicable to all tribes, whereas a treaty claim turns on the specific language of a treaty.

²⁸⁰ *United States v. Washington* (Phase II), 506 F. Supp. 187, 191 (W.D. Wash. 1980), *reversed on procedural grounds*, *United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985) (en banc).

fisheries when it made decisions, such as permitting decisions, that could degrade salmon habitat.²⁸¹ In this "Phase II" of the *United States v. Washington* litigation, the district court of Washington adopted a "common sense" approach²⁸² to treaty interpretation, finding that the treaties contained an implied right of protection for the fisheries and that the state had a duty to "refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs."²⁸³ The court held:

[I]mplicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made despoliation.

...

[O]ne of the paramount purposes of the treaties in question was to reserve to the tribes the right to continue fishing as an economic and cultural way of life. It is equally beyond doubt that the existence of an environmentally-acceptable habitat is essential to the survival of the fish, without which the expressly-reserved right to take fish would be meaningless and valueless. Thus, it is necessary to recognize an implied environmental right in order to fulfill the purposes of the fishing clause. Indeed, courts have already recognized implied water rights for the specific purpose of preserving fish.²⁸⁴

Judge Orrick's decision, though broader in scope, fell in line with decisions of other courts that found a duty of environmental protection in the narrower context of water rights.²⁸⁵ One year after Judge Orrick issued his path-breaking decision, the Ninth

²⁸¹ See *Washington (Phase II)*, 506 F. Supp. at 202 n.57, 206-07 ("[T]his case [does not] involve an attempt by plaintiffs to impose an affirmative duty on the State to protect the fish habitat. Rather, plaintiffs seek the recognition of a negative duty such that when the State exercises its broad regulatory powers it does not impair the environmental conditions necessary for the survival of the treaty fish.").

²⁸² Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 *U. Colo. L. Rev.* 407, 414 (Spring 1998).

²⁸³ *Washington (Phase II)*, 506 F. Supp. at 208.

²⁸⁴ *Id.* at 203.

²⁸⁵ For review of these cases, see Blumm & Swift, *supra* note 282, at part V.A. For further discussion of the treaty right to environmental protection, see Peter C. Monson, *United States v. Washington (Phase II): The Indian Fishing Conflict Moves Upstream*, 12 *Env'tl. L.* 469 (1982); Gary D. Meyers, *United*

Circuit decided *United States v. Adair*, which found that the Klamath Tribe's aboriginal use of waters since "time immemorial" was adequate to support a modern-day instream water right to benefit tribal fish and wildlife resources.²⁸⁶ Both *Adair* and *Washington Phase II* recognize an implicit tribal property right to maintain elements of the abundant natural trust that are key to the fishing rights expressly reserved in the treaties. Judge Orrick rejected the notion that government has an unfettered prerogative to embark on wholesale diminishment of the trust to achieve progress, writing:

The State suggests that the tribes entered the treaty negotiations with the understanding that the United States was encouraging non-Indian settlement of the West, that non-Indians would commercially develop the natural resources, and that the United States intended to diversify the Indian economy and acculturate the Indians into the non-Indian way of life. To the contrary, it is well established that the treaty negotiators specifically assured the tribes that they could continue to fish notwithstanding the changes that the impending western expansion would certainly entail.

It has been stated repeatedly that neither party to the treaties, nor their successors in interest, may act in a manner that destroys the fishery.²⁸⁷

After finding a broad duty of environmental protection, Judge Orrick deferred the questions of whether the state was violating the tribes' environmental right and what relief may be warranted, reserving both matters for the later remedy stage of the litigation.²⁸⁸ This proved to be a fatal procedural step. On appeal, an en banc panel of the Ninth Circuit vacated Judge Orrick's path-breaking opinion on the procedural ground that

States v. Washington (Phase II) Revisited: Establishing an Environmental Servitude Protecting Fishing Rights, 67 Or. L. Rev. 771 (1988); Judith W. Constans, *The Environmental Right to Habitat Protection: A Sohappy Solution--United States v. Washington*, 61 Wash. L. Rev. 731 (1986).

²⁸⁶ *United States v. Adair*, 723 F.2d 1394, 1399 (9th Cir. 1983).

²⁸⁷ *Washington (Phase II)*, 506 F. Supp. at 204.

²⁸⁸ *Id.* at 207-08.

there was a lack of concrete facts to support a declaratory judgment.²⁸⁹ Accordingly, the substantive issue of whether there is a treaty right to environmental protection for fisheries remains largely unsettled outside of the context of water rights.

B. United States v. Washington: The Culverts Litigation

On January 16, 2001, 20 Puget Sound tribes re-initiated the *United States v. Washington Phase II* litigation to press the environmental protection issue in a very narrow context challenging the state of Washington's maintenance of culverts.²⁹⁰ Culverts are man-made tunnel-like structures that direct watercourses under roads. Improperly constructed culverts block fish passage up streams, preventing adults from spawning and juveniles from out-migrating.²⁹¹ Collectively, they eliminate a vast portion of otherwise available habitat for fish. According to the tribes, culverts owned and maintained by the Washington Department of Transportation (WDOT) alone obstruct access to at least 249 linear stream miles of habitat, 407,464 square meters of salmon spawning habitat, and at least 1,619,839 square meters of salmon rearing habitat across the state of Washington.²⁹² Culverts are also maintained by the Washington Department of Fish and Wildlife (WDFW) and the Department of Natural Resources, bringing the state total to at least

²⁸⁹ *United States v. Washington*, 759 F.2d 1357 (9th Cir. 1985) (en banc). Because Judge Orrick had deferred the question of whether the state had violated its duty to protect tribal fisheries, there was an inadequate basis in the record for showing that state-controlled actions, such as permitting third party activities, caused fish decline. For discussion, see Blumm & Swift, *supra* note 282, at 417-18.

²⁹⁰ Request for Determination, *United States v. Washington*, Civ. No. C70-9213, Sub-Proceeding No. 01-01 (W.D. Wash. Jan. 16, 2001) [hereinafter *Culverts Complaint*]. The Request for Determination is the procedural device to assert a new claim in ongoing litigation. The district court retained jurisdiction in the *United States v. Washington* case to ensure implementation of the Phase I-decreed allocation. See *supra* note 275.

²⁹¹ *Culverts Complaint*, *supra* note 290, at 4.

²⁹² *Id.* at 5.

1,274 culverts.²⁹³ The tribes' complaint alleges that the "right of taking fish" secured by the Stevens Treaties

imposes a duty upon the State of Washington to refrain from diminishing, through the construction or maintenance of culverts . . . the number of fish that would otherwise return to or pass through the tribes' usual and accustomed fishing grounds and stations, to the extent that such diminishment would impair the tribes' ability to earn a moderate living from the fishery.²⁹⁴

The tribes seek injunctive relief requiring the state of Washington to identify and open all state culverts that obstruct passage for Indian fisheries within five years of the date of judgment.²⁹⁵

The "culverts case," as it is called by practitioners in the field, is a well-crafted case that is likely to surmount the concerns expressed by the Ninth Circuit in vacating Judge Orrick's earlier opinion. Unlike its predecessor case that sought a broad declaration of the state's duty without asserting any concrete facts linking state action to fish decline, this case alleges discrete action that is unquestionably directly responsible for fish loss. Culverts are physical devices that directly harm fisheries by blocking passage. While a host of environmental conditions such as pollution, sedimentation, water temperature, and riparian damage are also equally fatal to fish, the culverts cause losses that are more directly observable. The state itself has issued several reports detailing the damage from

²⁹³ According to a recent state report, 1,274 fish passage barriers have already been identified, but based on extrapolation, the number may reach 2,207 as others are identified. <BI>Washington State Department of Fish & Wildlife & Washington State Department of Transportation, Progress Performance Report for WSDOT Fish Passage Inventory<D> 7 (Apr. 2005) [hereinafter <BI>Progress Performance Report<D>]. Some media reports put the number at 2,400 culverts statewide. See Lynda V. Mapes, *Another Potential Lightning Bolt*, <BI>Seattle Times<D>, Jan. 17, 2001; Engelson, *supra* note 22.

²⁹⁴ *Culverts Complaint*, *supra* note 290, at 6-7.

²⁹⁵ *Id.* at 1-2.

state operated culverts.²⁹⁶ Accordingly, this case is unlikely to be plagued by the questions of causation that lurked in the background of the Ninth Circuit opinion vacating Judge Orrick's decision.

Moreover, unlike the prior *Phase II* case, the relief requested is very specific. The problem is precisely delineated, as the state of Washington has already inventoried all of the state highway stream crossings that block passage and has published the inventory in a series of reports.²⁹⁷ There is available technology for retrofitting culverts to allow fish passage.²⁹⁸ In crafting injunctive relief, the court would not be forced to grapple with technical or feasibility issues--something courts hesitate to do--as there is already an administrative structure in place at the state level to correct the culvert problem. Two agencies, the WDFW and the WDOT, are taking the lead in this recovery effort, and 142 barriers have already been fixed.²⁹⁹ The remedy requested by the tribes would seemingly bootstrap the administrative structure already in place but expedite the process to completion within 5 years instead of the 20 to 100 years identified by the state.³⁰⁰ Compared to the court's task in overseeing the harvest allocation regime established under the first phase of *United States v. Washington*, this judicial role is far more confined.

One of the most compelling aspects of this case is that it quantifies the current losses to tribes and the potential benefits from a judicial remedy in terms of the salmon

²⁹⁶ See *id.* at 5 (citing reports); see also <BI>Progress Performance Report<D>, *supra* note 293.

²⁹⁷ *Culverts Complaint*, *supra* note 290, at 5.

²⁹⁸ See Engelson, *supra* note 22; <BI>Progress Performance Report<D>, *supra* note 293, at 16 (summarizing culvert correction plan); see also *Culverts Complaint*, *supra* note 290, at 4 (“The blocking of fish passage at human made barriers such as road culverts is one of the most recurrent and correctable obstacles to healthy salmonid stocks in Washington.”).

²⁹⁹ <BI>Progress Performance Report<D>, *supra* note 293, at 4, 7.

³⁰⁰ *Culverts Complaint*, *supra* note 290, at 6.

asset itself. According to the tribes, the state agencies themselves estimate that approximately 200,000 adult salmon would be produced as a result of culvert correction.³⁰¹ By choosing a set of facts where the harm to salmon is quantified, the tribes have the opportunity to portray vividly the diminished natural trust they face as a result of state actions. As noted at the outset of this Article, any meaningful analysis of treaty rights must now steer the focus away from the traditionally dominant emphasis on harvest that was center stage in the first phase of the *United States v. Washington* litigation. Focusing on culverts as a discrete cause of fish decline begins the shift that courts and government as a whole must make away from harvest issues to the underlying issues of natural capital. The culverts case represents a step toward defining the tribal property interest as one in salmon capital as well as yield using factual circumstances that are confined and well established. Whether courts are prepared to take that next step remains to be seen.

After several failed attempts at settlement, the culverts case is currently scheduled for trial in 2007. If the court finds a treaty-based right to environmental protection of fisheries, the case will likely provide a foothold from which tribes can assert a property right to maintaining other elements of the natural capital necessary for their fish harvest.³⁰² Certainly, tribes are armed with concrete facts to challenge a multitude of actions beyond culverts that cause damage to salmon or their habitat. In the two decades since the Ninth Circuit's decision in *United States v. Washington Phase II*, an enormous amount of scientific information has accumulated as a result of the ESA listings of

³⁰¹ *Id.* at 5.

³⁰² Tribal and state officials alike have noted the potentially broad effect of a decision affirming a right to environmental protection of the fish. *See* Mapes, *supra* note 293; Engelson, *supra* note 22.

Pacific salmon up and down the west coast. The extensive reports and studies on the salmon life cycle create a sound factual basis that would in many cases satisfy the requirement of concrete harm that the Ninth Circuit insisted upon in *Washington Phase II*.

One looming question is how such a duty of protection would apply to the federal government, which is responsible for a host of actions that collectively diminish the natural trust. In their Request for Determination, the tribes directed their cause of action toward state actions and omitted all federal actions. As trustee for the tribes, and the original party that initiated the *Washington Phase II* litigation on behalf of the tribes, the federal government is automatically a party to the culverts sub-proceeding in the ongoing litigation. The federal government submitted a response to the tribes' Request for Determination in which it reiterated the tribes' assertion that the treaties impose a duty upon the state to refrain from degrading the fishery resource through maintenance of culverts.³⁰³ The government, on behalf of the tribes, also requested the same injunctive relief that the tribes had requested.³⁰⁴

The federal acknowledgement of the duty of environmental protection in this context is important. Logically, since the treaties bind the federal government as a primary party, it would seem apparent that the federal government has at least all of the duties that fall upon the states as successor parties.³⁰⁵ Whether those duties are enforceable, however, is a separate matter. The *Pacific Coast Federation* litigation makes

³⁰³ United States' Response to Request for Determination 3-4, *United States v. Washington*, Civ. No. C70-9213, Sub-Proceeding No. 01-01, Jan. 16, 2001 (W.D. Wash.).

³⁰⁴ *Id.* at 4-6.

³⁰⁵ In *Washington Phase II*, Judge Orrick commented that "the federal government is under a comparable duty, as a party to the treaties, not to violate the tribes' environmental right . . ." *United States v. Washington (Phase II)*, 506 F. Supp. 187, 206 (W.D. Wash. 1980).

clear that challenges to federal agency action must be premised on the APA's waiver of sovereign immunity.³⁰⁶ If a tribe challenges agency action under APA §706(2)--as the Yurok Tribe did in *Pacific Coast Federation*--it runs squarely into the present muddled case law that seemingly requires a "positive law" basis for a common law claim.³⁰⁷ Even so, if a court specifically determines that the right of environmental protection is encompassed within the language "secur[ing]" the right of taking fish,³⁰⁸--akin to the Supreme Court's determination that the right to an "equal division" of the harvest is implicitly incorporated into the treaty language granting the Indians the right to fish "in common with" the settlers³⁰⁹-- the treaties themselves seemingly provide the requisite positive law. Moreover, if the Ninth Circuit adopts a property rights exception to the current "positive law" requirement--as this Article urges--tribes should be able to pursue a claim under the APA that presents fisheries protection as a corollary property right arising out of the treaties. Obviously there is little difference between the two angles of treaty construction. Suffice it to say, a court decision declaring an environmental right of protection in the culverts litigation could have important applicability to claims against the federal government brought under the APA.³¹⁰

³⁰⁶ See *supra* note 246 and accompanying text.

³⁰⁷ See *supra* notes 240-57 and accompanying text.

³⁰⁸ See *supra* note 26 (citing treaty language); see also Wood, *supra* note 24, at 376-387 (arguing that term "secured" in treaty amounts to express recognition of duty to protect fish subject to harvest).

³⁰⁹ See *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 686 n.27 (1979).

³¹⁰ The state of Washington tried to hold the federal government accountable for its culverts on federal land by bringing a cross-claim against the federal government. The court dismissed the claim on the basis that the federal government's sovereign immunity had not been waived. Order on Motion for Leave to Amend, *United States v. Washington*, CV 9213RSM, Subproceeding No. 01-01 (W.D. Wash. Mar. 7, 2005). The state had premised its claims on §706(1) of the APA, which authorizes the district court to compel agency action that has been "unlawfully withheld" or "unreasonably delayed." 5 U.S.C. §706(1). The district court applied *Norton v. Southern Utah Wilderness Alliance (SUWA)*, 124 S. Ct. 2373, 2379 (2004), to find that a claim under §706(1) can only proceed where "a plaintiff asserts that an agency failed

In any case seeking to enforce a treaty-based obligation to protect fisheries-- whether brought against a state, the federal government, or a private party--a court will likely demand a showing of concrete facts and precise relief narrowly tailored to the alleged harm. For tribes, the great benefit of a treaty-based claim is that it arises outside of the narrow administrative context, so there is no particular deference owed to a defendant agency. Moreover, the court has the equitable authority to structure relief in a flexible manner, as the long history of harvest litigation makes clear. The drawback, however, is that courts operating outside the statutory context find it daunting to structure relief without a clear administrative structure in place to implement the relief. Courts are not generally keen to fill an administrative vacuum. In formulating cases, therefore, tribal litigants should search for those contexts--much like the culverts context--where the action is discrete and where there is already an administrative structure in place to support a court injunction.³¹¹

IV. Conclusion

At a time when species nationwide face extinction due to the rapid depletion of natural capital, tribes are turning to the courts to enforce their property rights to continue their fishing livelihoods. They seek a judicial check on the federal and state agencies that are

to take a *discrete* agency action that it is *required to take*.” Order on Motion for Leave, *supra*, at 3 (citing *SUWA*)(emphasis in original). The court noted that the state had not based its counterclaim on any discrete action that the federal agencies are “legally required to take.” *Id.* It was unpersuaded by the state’s arguments that the governing forest plan requires the Forest Service to maintain fish passage at road crossings, interpreting *SUWA* as stating that claims based on forest plans are not actionable. *Id.*

³¹¹ Absent an existing administrative structure, plaintiffs might propose a negotiated remedy process to create a judicial structure for relief. Such a process was successful in the harvest litigation in both Washington and Oregon. For discussion, see Wood, *supra* note 24, at 423-441.

destroying fisheries through a myriad of administrative actions. The challenge for courts is historic. As the commemoration of the Lewis and Clark Bicentennial reminds us, the new sovereigns on this land have depleted the abundant natural trust that once existed in a matter of just two centuries. Whether government has a responsibility to the tribes to maintain a portion of that trust as consideration for the millions of acres of land ceded a century and a half ago is the fundamental question courts will inevitably face.

This Article has explored three pending cases in which tribes are seeking protection of their fisheries. Each case involves a different set of claims, but all share the common element of challenging the courts to invoke their judicial powers in a meaningful way to force some restoration of a radically diminished natural trust. In the Columbia River Basin, tribes are amici in ongoing litigation brought under the ESA seeking to reform hydrosystem operations that cause an overwhelming percentage of salmon mortality. There the court faces a situation of extreme fish decline that has been unaffected by ESA protection because the NMFS has never forced adequate changes to the dams and remains recalcitrant today. In this case the court not only confronts the challenge of defining obligations under the ESA, but also the task of framing meaningful relief in light of a de facto administrative vacuum. In a series of recent opinions and orders, the court found the NMFS' biological opinion invalid under §7 of the ESA and ordered the Corps to spill water over the dams, a measure upheld by the Ninth Circuit. The tribes are important players in this litigation because, though they are merely amicus parties, they are recognized co-managers of the fishery, have substantial expertise to contribute to the court, and were awarded a key role in the remand phase of the case.

In the *Pacific Coast Federation* litigation brought in the Klamath Basin, tribes are asserting a trust claim distinct from statutory law to gain relief for a set of river conditions that they hold responsible for the massive fish kill that occurred in 2002. The claim is brought in the context of broader ongoing litigation under the ESA. The court in that case is clearly more comfortable with the statutory context than the common law trust context. The court forced in-river operational changes under the ESA back in 2001 and was instructed by the Ninth Circuit to craft further injunctive relief pending a remand of the biological opinion to the NMFS.³¹² The district court dismissed the tribes' trust claim under the APA, finding that it lacked a basis in statutory law. That claim is on appeal before the Ninth Circuit, and the outcome will determine if common law claims to enforce the federal trust responsibility under the APA will have any continuing viability. The Ninth Circuit has an opportunity to correct a muddled area of case law that currently requires a "positive law" basis for trust claims under the APA. The "positive law" requirement, imported without consideration from the Tucker Act context, has never been thoughtfully evaluated by any court in the context of the APA and amounts to a wholly phantom requirement because few if any environmental statutes have any explicit recognition of a trust responsibility. However, even if the Ninth Circuit holds to this line of precedent, it still has the opportunity to craft an exception that allows tribes to pursue trust claims based on their property rights.

Finally, in the Puget Sound litigation, tribes are making a pure treaty rights claim to support protection of their fisheries. Though they are challenging a discrete category of state action--the maintenance of fish-blocking culverts--the case carries the potential for a

³¹² See *supra* Part II.B. and accompanying text.

ruling with powerful precedent. The case resurrects a similar claim made by the federal government on behalf of the tribes 25 years ago that gained a victory in federal district court but was overturned by the Ninth Circuit on procedural grounds. If the district court finds a treaty-based environmental duty of protection, the tribes may have a legal foothold to address a myriad of other actions that are destroying their fishing livelihood.

In the end, while all three cases rest on different legal theories, they all share a common thread. In fundamental terms they challenge courts to protect the natural capital so essential to the fishing livelihood that tribes were promised at the time they ceded millions of acres of land to the federal government. Though the tribes unwillingly relinquished their sovereign trustee authority over the natural resources off their reservations, courts have repeatedly said that the treaties and treaty equivalents are property rights that give rise to the federal duty of protection of those resources. Now, in the era of mass extinction, the real test is whether courts will enforce such promises against the federal and state agency trustees of the wildlife resource. Such trustees have both caused and allowed massive depletion--and near eradication--of the salmon resource that dominated the landscape when Lewis and Clark first set eyes on the Pacific Northwest. Just as tribes turned to the courts in the 1970s to provide protection of their fishing rights, so are tribes now turning to the courts to protect the natural capital on which their fishing yield depends. Whether the courts step up to this role will likely be the single most determinative factor in whether tribes will be able to continue a fishing culture that has endured for millennia and whether the Pacific Northwest will have salmon running in the streams 200 years from now.